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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Luis Bonilla, *et al*,
Petitioners,

v.

Volvo Car Corporation and
Trebol Motors Corporation *et al.*,
Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This suit is a class action brought by Petitioners against Respondents under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Petitioners are the purchasers of more than 9000 Volvo automobiles in Puerto Rico between 1983 and 1993. Respondents are Volvo, as well as the corporations and individuals who imported and sold Volvo cars in Puerto Rico. Petitioners alleged that Respondents fraudulently conspired to overcharge Petitioners for their cars in violation of RICO. The case was tried to a jury, which found Volvo liable for conducting a RICO enterprise and for conspiring to violate RICO. The jury awarded damages of $43 million, which the district court trebled to $129 million.

On appeal, the First Circuit found the evidence sufficient to support a finding of liability against the Respondents other than Volvo. As to Volvo, the court of appeals reversed based on circuit precedent, holding that Volvo had not itself "committed predicate acts of mail or wire fraud, a crucial element of plaintiff's RICO claim." But the First Circuit failed to recognize that its circuit precedent had been invalidated after the close of briefing on appeal. In *Salinas v. United States*, 522 US 52, ___, 118 S. Ct. 469, 476 (1997), this Court considered but rejected the First Circuit's rule, unanimously holding that RICO does not require proof that a co-conspirator such as Volvo "committed or agreed to commit the two predicate acts requisite for a substantive RICO offense."

The question presented is:

Should certiorari be granted, the judgment vacated, and the case remanded for further consideration in light of *Salinas v. United States*, 522 US 52 (1997)?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, defendants Trebol Motors Corporation, Ricardo Gonzalez-Navarro, and Conchita Navarro de Gonzalez were parties to the proceedings below and are Respondents here.

The named class plaintiffs, who are Petitioners here, are Luis A. Bonilla, Carmen M. Ortiz, the legal conjugal partnership formed by Mr. Bonilla and Ms. Ortiz, Miguel A. Mercado, Betsy Vazquez, the legal conjugal partnership formed by Mr. Mercado and Ms. Vazquez, Pedro Umpierre, Nancy Torregrosa, the legal conjugal partnership formed by Mr. Umpierre and Ms. Torregrosa, 200 Fortaleza Jewelry, Inc., Cecilio Santiago Toledo, Yosecelinda Ciordia Santiago, the legal conjugal partnership formed by Mr. Santiago and Ms. Ciordia, Jose Miguel Hernandez Rodriguez, Antonia Lopez Caceres, the legal conjugal partnership formed by Mr. Hernandez and Ms. Lopez, Wanda I. Santiago Santiago, Alberto Colón Valentin, and Rafael A. Cox.

Petitioners certify that the only corporate Petitioner, 200 Fortaleza Jewelry, Inc., has no parent companies or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Luis Bonilla *et al.* ("Petitioners") respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The orders of the United States District Court for the District of Puerto Rico denying various post-trial motions of Respondents (*id.* at 1a-17a, 18a-28a) are unreported. The First Circuit's companion opinions reversing the judgment as to Respondent Volvo Motor Corporation (hereinafter "Volvo") (*id.* at 29a-55a) and vacating the judgment and remanding as to Respondents Trebol Motors Corporation *et al.* (hereinafter "Trebol") (*id.* at 56a-75a) are reported at 150 F.3d 62 and 150 F.3d 77. The court of appeals' order denying rehearing and rehearing *en banc* (*id.* 76a-77a) is unreported.

JURISDICTION

Statutory basis for jurisdiction. The district court had jurisdiction over Petitioners' Complaint under 28 USC 1331. The court of appeals had jurisdiction under 28 USC 1291. Petitioners invoke this Court's jurisdiction under 28 USC 1254(1).

The First Circuit issued its companion opinions in this case on July 28, 1998. On October 8, 1998, the First Circuit denied rehearing and rehearing *en banc*. On December 29, 1998, Justice Souter extended the time to file a Petition for a Writ of Certiorari to and including February 4, 1999. On January 26, 1999, Justice Souter further extended the time to file a Petition to and including March 5, 1999. Apps. No. 98-523, 98-524.

A previously filed Petition for a Writ of Certiorari (No. 98-1092, *Gonzalez-Navarro v. Bonilla*) already is pending

from the First Circuit's judgment in this case.[1] Petitioners here are the Respondents in the No. 98-1092 case and contemporaneously are waiving their right to respond to that Petition.

Timeliness. Volvo erroneously contends that this Petition for a Writ of Certiorari is untimely. *See* Letter from Gael Mahony, Counsel to Volvo, to William K. Suter (dated Jan. 4, 1999) (on file with the Clerk's office). Specifically, Volvo contends that Petitioners sought rehearing out of time in the First Circuit. The relevant and undisputed facts are as follows. The First Circuit issued its opinions, and entered its judgment in this case, on July 28, 1998. Two petitions for rehearing were filed: (i) Petitioners mailed their request for rehearing to the First Circuit fourteen days after its entry of judgment, on August 11, 1998, and it was docketed two days later, on August 13, 1998; and (ii) two of the defendants, who are petitioners in the No. 98-1092 case, sent their request for rehearing by overnight service on August 10, and it was docketed by the First Circuit on August 11. The court of appeals considered the petitions for nearly two months, ultimately denying them together on October 7, 1998 in an order explaining that they had "been carefully considered." Pet. App. 77a. The First Circuit subsequently issued its mandate twelve days later, on October 19, 1998.

Volvo's argument proceeds in two parts. First, Volvo maintains that this Petition is timely only if Petitioners' request for rehearing in the First Circuit was timely. Second, Volvo maintains that Petitioners' request for rehearing was untimely because it was not received by the First Circuit within fourteen days after the court of appeals' entry of judgment. Both contentions are entirely erroneous, but we

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[1] That Petition presents two questions: (i) whether the court of appeals failed to adhere to FRCP 15(b); and (ii) whether defendants who consent to a default on the merits nonetheless are entitled to a jury trial on damages.

will treat them extensively so that there is no ambiguity about this Court's jurisdiction.

This Petition is timely because another party timely sought rehearing in the First Circuit. It is undisputed that Volvo's co-defendants filed a petition for rehearing, which was received by the First Circuit within the fourteen-day deadline. Under this Court's Rule 13.3, "if a petition for rehearing is timely filed in the lower court *by any party*, the time to file the petition for a writ of certiorari *for all parties* (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing" (emphasis added). The First Circuit disposed of Volvo's co-defendants' timely petition for rehearing on October 7, 1998, thereby extending the time to file this Petition. We have confirmed with the Clerk's office of this court that our understanding of Rule 13.3 is correct.

In any event, Petitioners timely sought rehearing in the First Circuit because petitions for rehearing are "briefs" for purposes of the Federal Rules of Appellate Procedure ("FRAP"). FRAP 40(a) provides that petitions for rehearing must "be filed within fourteen days after entry of judgment," but does not define "filed." Volvo points to Rule 25(a)(2)(A), which provides that "[i]n general," papers must be received by the court of appeals "within the time fixed for filing." But Volvo ignores that Rule 25(a)(2)*(B)* provides that "[a] brief" "is timely filed * * * if on or before the last day for filing, it is * * * mailed to the clerk." The Rules do not specify whether petitions for rehearing are governed by subsection (A) or subsection (B), but every indication is that such petitions are to be treated as "briefs." Thus, Rule 40(b) requires that "[c]opies [of petitions for rehearing] must be *served and filed*" as prescribed by Rule 31 (emphasis added), which governs "Serving and Filing *Briefs*" (emphasis added). In addition, Rule 40(b) requires that a petition for rehearing "comply in form with Rule 32," which governs "Form of a *Brief*" (emphasis added).

Any ambiguity about the Rule is resolved by the fact that the First Circuit itself treated Petitioners' request for rehearing as timely. A court of appeals necessarily has the power to deny a petition for rehearing as untimely, but the First Circuit did not do so here. Instead, it considered the petition for two months, before issuing an order that denied rehearing but expressly stated that the court of appeals had "carefully considered" the petition. Moreover, the First Circuit issued its mandate after denying rehearing, not after issuing the panel opinion, which necessarily means that it deemed the petition to be timely filed. *See* FRAP 41 ("The court's mandate *must* issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a *timely* petition for panel rehearing, rehearing *en banc*, or motion for stay of mandate, whichever is later." (emphasis added)); *see also Missouri v. Jenkins*, 495 US 33, 47-48 & n.17 (1990) (holding that time to file petition for certiorari was tolled by ambiguous rehearing request, given that court of appeals withheld its mandate until it denied the request).

STATUTORY PROVISIONS INVOLVED

Petitioners alleged in their original and amended complaints that Respondents conspired to violate RICO in violation of 18 USC 1962(d), which provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." The underlying RICO provision invoked by Petitioners, 18 USC 1962(c), provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

STATEMENT OF THE CASE

This case involves the standard for proving a civil RICO conspiracy. Specifically, will a RICO conspiracy claim lie against a defendant who does not agree to commit two or more RICO predicate acts? This question long ago gave rise to a substantial circuit conflict, which this Court resolved in December 1997 while this case was pending before the First Circuit. The Court held in *Salinas v. United States*, 522 US 52, 118 S. Ct. 469 (1997), that a RICO conspiracy claim does not require proof that the defendant agreed to commit two RICO predicate acts. Instead, the plaintiff must prove that the defendant "adopt[ed] the goal of furthering or facilitating the criminal endeavor." 118 S. Ct. at 477.

Petitioners in this case are the purchasers of more than 9,000 "200 Series" Volvo automobiles in Puerto Rico between 1983 and 1993. Respondents are the corporations and individuals responsible for manufacturing, importing, and selling those cars. Volvo manufactured the cars and delivered them for sale in close coordination with its Puerto Rican importer, Trebol Motors Distributor Corporation, and dealer, Trebol Motors Corporation (collectively "Trebol"). Respondents Conchita Navarro de Gonzalez and Ricardo Gonzalez Navarro (collectively "the Gonzalezes") owned Trebol.

The case specifically involves a grossly fraudulent scheme implemented by Respondents to deceive the citizens of Puerto Rico into paying excessive prices for Volvo cars. Petitioners alleged and proved at trial that Respondents violated RICO, through *hundreds* of predicate acts of mail and wire fraud, by fraudulently inflating the costs and prices listed on mandatory disclosure stickers, causing Petitioners to pay inflated prices. Trebol and the Gonzalezes subsequently acknowledged their fraudulent activities, consenting to the entry of a default as to the allegations of the Complaint. Pet. App. 57a.

In the ensuing trial against Volvo, the jury rejected Volvo's defense that it had not participated in any scheme to

defraud Petitioners, finding Volvo liable under RICO's substantive and conspiracy provisions (*see* 18 USC 1962). In a bifurcated proceeding, the jury awarded Petitioners actual damages of $43,197,100. Pet. App. 32a. The district court held a further hearing on damages and concluded that the same damage award should be entered against the remaining defendants, consistent with the jury verdict and the proof at trial. The district court trebled the damage award, pursuant to 18 USC 1964(c), to $129,591,300, and entered a final judgment as to all the defendants for the full amount of the award. *Id.* at 32a.

Volvo appealed, arguing that it had not agreed to commit two or more RICO predicate acts, as required by long-standing First Circuit precedent. The court of appeals agreed and therefore reversed the entire $129 million judgment against Volvo. But the court of appeals failed to recognize that, while this case was pending, this Court had in *Salinas v. United States*, 522 US 52 (1997), considered and rejected the First Circuit's standard for establishing a RICO conspiracy.

I. Petitioners' Evidence At Trial Established Respondents' RICO Conspiracy.

A. Petitioners Alleged, And The Jury Found, That Volvo and Its Co-Conspirators Engaged In Multiple Fraudulent Acts In Violation Of RICO.

Petitioners' proof at trial related principally to "five frauds" committed by Respondents in their scheme to charge Petitioners excessive costs for 200 Series Volvo automobiles. In light of the First Circuit's decision, we will address here elements of three of the frauds[2]: (i) "Double Invoicing" fraud, in which Respondents used a dummy Liechtenstein

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[2] We address only these three specific frauds in the Petition because the First Circuit found that each would establish a violation of RICO. *See infra* at 16-18. All the frauds nonetheless would remain relevant to a decision on remand or any retrial.

corporation to create invoices showing falsely inflated dealer invoice costs; (ii) "Disclosure Label" fraud, in which Respondents placed these falsely inflated invoice costs and falsely inflated manufacturers' suggested retail prices ("MSRP") on official government labels that were displayed to customers; and (iii) "FOB Price" fraud, in which Respondents reported false "factory gate" prices for cars. The jury found, based on these frauds, that Respondents had violated both the RICO conspiracy provision (18 USC 1962(d)) and the underlying RICO prohibition against conducting an enterprise through a pattern of racketeering activity (*id.* § 1962(c)).

Double Invoicing. Respondents together used a sham Liechtenstein company, Auto Und Motoren ("AUM"), to facilitate their fraudulent misreporting of invoice costs and retail prices. Volvo provided AUM with invoices for the cars it delivered to Trebol. C.A. App. A.2256. AUM then provided Trebol with false invoices reflecting invoice costs that often were several thousand dollars higher. *Id.* at A.1141-43. These fraudulently inflated costs were used to deceive customers into paying excessive prices for their cars. When Trebol later remitted the invoice price, AUM forwarded some amount to Volvo and retained the remainder tax free in Liechtenstein. *Id.* at A.1430-33.

Volvo maintained at trial that AUM was a "guarantor" for Trebol's obligations to Volvo. The evidence, however, showed that AUM served no function other than as a money launderer between Volvo and Trebol, and furthermore that Volvo did not use this "double invoicing" methodology in any other market in the world. C.A. App. A.1430-33, A.2260-61. Nor could Volvo either explain why it had loaned AUM nearly $3 million if AUM itself supposedly served as a "guarantor" or why Volvo approved AUM's acquisition of an interest in Trebol.

Disclosure Labels. Both federal and Puerto Rican law require specific disclosures in the sale of cars. A federal statute known as the "Monroney Act" (15 USC 1231 *et seq.*)

requires that prior to sale, every car be affixed with a sticker identifying the make, model, place of manufacture, and MSRP, as well as the price of transportation and any separate accessories. *Id.* § 1232. A Puerto Rican statute known as "Law 77" required the disclosure of, *inter alia*, the car's factory invoice cost and total cost. 23 LPRA 1023.[3]

Petitioners' proof at trial was that Respondents conspired to create false and misleading disclosure labels to trick Petitioners into paying excessive prices for their cars. After negotiations, customers almost always pay a price between invoice cost and MSRP. C.A. App. A.960-61. Here, the Respondents' disclosure labels stated factory invoice and total costs that were falsely inflated by several thousand dollars and furthermore set forth a MSRP that was a few thousand dollars more than the actual MSRP. These inflated cost and MSRP figures induced Petitioners into negotiating the final price for their cars from a fraudulently inflated price range.

FOB Price. Respondents were required by law to certify to the Puerto Rican government a variety of information regarding every car imported, including the "factory gate" ("FOB") price. The government, in turn, used the FOB price to set the excise tax for the vehicle. Respondents, however, provided false FOB prices on the invoices in order to minimize their tax exposure and to lower their costs relative to competitors, thereby increasing their profits. C.A. App. A.259, A.1405-07. Volvo itself presented blank certificates of origin in order to circumvent these taxes. *E.g.*, *id.* at R.A.1601. When Volvo inadvertently sent certificates with actual figures, Trebol returned them to be replaced with blanks. *Id.* at R.A.1599. Volvo also specifically agreed, in writing, to list a factory invoice price increase as a separate line item, in order to evade taxes. *Id.* at A.2239-42, R.A. 1661, R.A.1812.

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[3] Law 77 was repealed in 1992. *See* 1992 P.R. Laws Act 80.

B. Petitioners Proved That Volvo Was Heavily Involved In The Conspiracy.

Petitioners presented both direct and indirect evidence that Volvo was centrally involved in the scheme to defraud Petitioners in their purchases of Volvo cars. Volvo's relationship with the other Respondents extended far beyond that of a car manufacturer and its importer. As the district court explained in summarizing just some of the evidence of Volvo's participation in the fraud:

> In addition to selling Trebol the Volvo vehicles, Volvo provided Trebol with assistance in advertising the vehicles, training for personnel, and financial assistance in certain instances. Representatives of Volvo visited Trebol's business facilities in Puerto Rico, several times a year, and representatives of Trebol traveled to Sweden or Spain for meetings with Volvo. In between the personal meetings between representatives of the two entities, representatives of Volvo and Trebol communicated with each other continuously over the telephone and fax. During the relevant time period, sales of Volvo vehicles in Puerto Rico exceeded approximately $600 million. A Volvo representative testified that the success of Trebol was Volvo's best guarantee of its own prosperity.

Pet. App. 4a.

Volvo's staff were particularly attentive to Trebol's activities, employing a large bureaucracy that oversaw sales in Puerto Rico. C.A. App. A.790-1, R.A.1778-1. Volvo specifically had the power to determine issues relating to marketing, pricing, and sales, and Volvo's expert admitted at trial that Volvo was involved in setting retail prices. *Id.* at R.A.1591, R.A.1700-07. There is no question that Volvo was the dominant party and easily could overrule Trebol's decisions. *Id.* at A.418-19, A.1734; R.A.1620-23, R.A.1808.

Volvo specifically was heavily involved in Trebol's finances, such that it had access to all of Trebol's financial

records. C.A. App. A.450; R.A.1539-49, R.A.1782-83. In addition to the AUM corporation discussed above, Volvo and Trebol maintained an unusually close "open book" partnership. This agreement included personal quarterly meetings lasting several days in which sales, marketing, communications, advertising, pricing, and even government lobbying decisions were addressed and made jointly. *Id.* at A.1675; R.A.1622; R.A1589-90, Exh. A; R.A.1653-54; R.A.1579-82, Exh. B; R.A.1700-07; R.A.1713-14. The pricing issues included both FOB and retail prices. *Id.* At trial, Volvo continued to maintain that it and Trebol remained partners notwithstanding the overwhelming evidence of invoicing fraud and Trebol's express consent to the entry of a default as to the allegations of Petitioners' Complaint. *Id.* at A.388-90.

Volvo was, moreover, involved directly in Trebol's sales activities. Decisions about price and models were made jointly, if not solely, by Volvo. C.A. App. A.420-21, A.2169-70; R.A.1574-82; R.A.1700-07. Volvo's representatives also frequented and closely monitored the Trebol showroom, and furthermore trained Trebol's salespeople. *Id.* at A.110, 2158-49; R. 1653-54. Volvo certainly was aware of the grossly inflated prices that consumers were paying in Puerto Rico, as it used these prices as a "parameter[]" in "negotiating prices [with] Trebol." *Id.* at A.421, R.A.1574-82, R.A.1700-07. Trebol was, in fact, contractually bound to "give due regard to [Volvo's] advise concerning price and sales policies." *Id.* at R. 1550-73. Volvo also worked with Trebol to design sales promotions, all the way down to planning locations, activities, and guest lists. *Id.* at R. 1574-82.

Recognizing Volvo's active participation in the fraud, the jury found that all the Respondents had violated RICO, including the RICO conspiracy provision. The jury awarded actual damages of over $43 million, which the district court trebled to more than $129 million. Pet. App. 2a. Respondents appealed to the First Circuit.

II. The First Circuit Held That Petitioners Failed To Prove That Volvo Agreed To Commit Two Or More RICO Predicate Acts.

A. Volvo Appealed Based On Settled First Circuit Precedent Requiring Proof That Each Co-Conspirator Committed Two Or More RICO Predicate Acts.

Volvo contended on appeal that Petitioners had failed to prove that Volvo itself had agreed to commit two or more RICO predicate acts. Thus, Volvo maintained:

> Liability under § 1962(d) requires a finding that a defendant knowingly joined a conspiracy to violate one of the substantive RICO sections – in this case, §§ 1962(a) or 1962(c). *See* Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1561 (CA1 1994). RICO liability under either of those substantive sections is premised on the defendant's having engaged in a pattern of racketeering activity, which in turn requires the commission of at least two predicate acts. *See* 18 U.S.C. §§ 1962(a) and (c). Thus, to support their § 1962(d) claim, *plaintiffs had to prove that Volvo knowingly entered into an agreement to commit two predicate acts.*

Resp. Volvo's C.A. Br. at 29 (emphasis added). Quoting directly from the First Circuit's *Aetna* decision, Petitioners similarly acknowledged that Volvo was liable only if it had agreed to commit two RICO predicate acts. Petrs' C.A. Br. at 44 (quoting *Aetna Cas. Sur. Co.*, *supra*, 43 F.3d at 1561); *accord* Resp. Volvo's C.A. Reply Br. at 7 ("Plaintiffs also concede that they had to prove that Volvo knowingly entered into an agreement to commit two RICO predicate acts before Volvo could be liable under 18 U.S.C. § 1962(d). *See, e.g.*, Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1561 (CA1 1994).").

Volvo's argument reflected an ambiguity in the RICO statute that the First Circuit had resolved in favor of defendants nearly two decades ago. The conspiracy section

(18 USC 1962(d)) simply proscribes a "conspir[acy] to violate" one of three underlying provisions (18 USC 1962(a)-(c)). The underlying provisions, in turn, proscribe various actions undertaken "through a pattern of racketeering activity." The statute defines the latter phrase to "require[] at least two acts of racketeering activity," which commonly are referred to as "RICO predicate acts." 18 USC 1961(1), (5).

The statute therefore does not specify what level of involvement in a RICO conspiracy gives rise to liability. As the First Circuit explained when it first confronted the question:

> The statute * * * does not make clear the extent of the activity in which each defendant must engage to be culpable as RICO conspirators: must each RICO conspiracy defendant agree that someone in the enterprise will commit two predicate crimes, must each member agree to commit two such acts individually, or must each member actually commit two such acts individually?

United States v. Winter, 663 F.2d 1120, 1136 (1981), *cert. denied*, 460 US 1011 (1983).[4]

The First Circuit in *Winter* chose the middle course, holding "that a RICO conspiracy count must charge as [sic] a minimum that each defendant agreed to commit two or more specified predicate crimes." 663 F.2d at 1136. This standard added very little in terms of RICO liability. Under the First Circuit's approach, the only difference between a claim brought pursuant to one of the underlying RICO provisions (18 USC 1962(a)-(c)) and a conspiracy claim (*id.* § 1962(d)) was that the former required that each defendant "commit"

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[4] Although *Winter* was a criminal RICO prosecution, the same rule applies in civil cases. *Feinstein v. RTC*, 942 F.2d 34, 41 (CA1 1991); *Aetna Cas. Sur. Co.*, *supra*, 43 F.3d at 1562; *see also United States v. Shifman*, 124 F.3d 31, 35 n.1 (CA1 1997), *cert. denied*, 118 S. Ct. 1053 (1998).

two or more predicate acts, while the latter required that each defendant "agree to commit" those same acts.

The First Circuit recently explored its standard for proving RICO conspiracy claims in *Aetna Casualty Surety Co. v. P & B Autobody*, 43 F.3d 1546 (1994). That decision differentiated between the plaintiff's burden in proving (i) that the defendant agreed to commit two or more predicate acts, and (ii) that the defendant "knowingly joined the conspiracy." As to the former, the court upheld a RICO conspiracy judgment against a group of auto body shops and insurance adjusters, explaining that the defendants had "agreed with one or more others that two predicate offenses be committed." 43 F.3d at 1562. As to the latter, the court explained that the plaintiff properly had established that a co-conspirator "knowingly joined the conspiracy" by inference:

> It is not necessary * * * to find that each defendant knew all the details or the full extent of the conspiracy, including the identity and role of every other conspirator.
>
> * * * *
>
> All that is necessary to prove this element of the RICO conspiracy, against a particular defendant, is to prove that he or she agreed with one or more co-conspirators to participate in the conspiracy. Moreover, it is not necessary for the conspiratorial agreement to be express, so long as its existence can plausibly be inferred from words, actions, and the interdependence of activities and persons involved.

Id.

Although more than a dozen decisions of the First Circuit since 1981 have reiterated that each co-conspirator must agree to commit two or more RICO predicate acts,[5] that court came

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[5] In point of fact, over the past decade, one or both of the judges that decided this case participated in *all* of the First Circuit's precedents on this issue. *United States v. Shifman*, 124 F.3d 31, 35

to acknowledge that its was the "minority rule" in the circuits. *United States v. Carrozza*, 4 F.3d 70, 79 n.8 (1993), *cert. denied*, 511 US 1069 (1994). The Second and Tenth Circuits agreed with the First Circuit's rule,[6] but eight other circuits reached the opposite conclusion.[7] As the Fifth Circuit articulated the majority position:

(1997), *cert. denied*, 118 S. Ct. 1053 (1998) (Boudin, J., on panel); *United States v. Hurley*, 63 F.3d 1, 8-9 (1995) (per Boudin, J., joined by Selya, J.); *Libertad v. Welch*, 53 F.3d 428, 441 (1995) (Boudin, J., on panel); *Aetna Cas. Surety Co. v. P & B Autobody*, 43 F.3d 1546, 1561 (1994) (Boudin, J., on panel); *United States v. Carrozza*, 4 F.3d 70, 79 n.8 (1993) (Boudin, J., on panel); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 47-48 (1991) (per Selya, J.); *Feinstein v. RTC*, 942 F.2d 34, 41 (1991) (per Selya, J.); *United States v. Ruiz*, 905 F.2d 499, 503 (1990) (per Selya, J.); *United States v. Boylan*, 898 F.2d 230, 241, *cert. denied*, 498 US 849 (1990) (per Selya, J.); *United States v. Angiulo*, 897 F.2d 1169, 1213, *cert. denied*, 498 US 845 (1990) (Selya, J., on panel). For decisions prior to 1989, see *United States v. Lopez*, 851 F.2d 520, 524 (1988), *cert. denied*, 489 US 1021 (1989); *United States v. Angiulo*, 847 F.2d 956, 964, *cert. denied*, 488 US 928 (1988); *United States v. Winter*, 663 F.2d 1120, 1136 (1981), *cert. denied*, 460 US 1011 (1983).

[6] *United States v. Sanders*, 929 F.2d 1466 (CA10), *cert. denied*, 502 U.S. 846 (1991); *United States v. Ruggiero*, 726 F.2d 913, 921 (CA2), *cert. denied*, 469 US 831 (1984).

[7] They were the Third (*United States v. Adams*, 759 F.2d 1099, 1115-16, *cert. denied*, 474 US 971 (1985)), Fourth (*United States v. Pryba*, 900 F.2d 748, 760, *cert. denied*, 498 US 924 (1990)), Fifth (*United States v. Marmolejo*, 89 F.3d 1185 (5th Cir.), *aff'd sub nom. Salinas v. United States*, 522 US 469 (1997)), Sixth (*United States v. Joseph*, 781 F.2d 549, 554 (1986)), Seventh (*United States v. Neapolitan*, 791 F.2d 489, 494-500, *cert. denied*, 479 US 940 (1986)), Eighth (*United States v. Kragness*, 830 F.2d 842, 860 (1987)), Ninth (*United States v. Tille*, 729 F.2d 615, 619, *cert. denied*, 469 US 845 (1984)), and Eleventh Circuits (*United States v. Carter*, 721 F.2d 1514, 1529-31, *cert. denied*, 469 US 819 (1984)).

> Today we join the majority view among the circuits in holding that to be guilty of RICO conspiracy, the conspirator must simply agree "to the objective of a violation of RICO; he need not agree personally to violate the statute." * * * *
>
> * * * If we were to hold that in addition to agreeing to the overall criminal objective, a RICO conspirator had to agree to perform the actual crime, two predicate acts comprising a substantive violation of RICO, this holding would be a marked departure from traditional conspiracy law for which there is no support in the language of the statute or the statutory history.

United States v. Marmolejo, 89 F.3d 1185, 1196 (1996) (citation omitted), *aff'd sub. nom Salinas v. United States*, 522 US 52 (1997).

B. The First Circuit Concluded That The Defendants Other Than Volvo Had Violated RICO, But That Volvo Itself Had Not Agreed To Commit Two Or More RICO Predicate Acts.

Based on its long-standing precedent, the First Circuit agreed with Volvo's argument on appeal and reversed.[8] At the outset, however, the court of appeals made clear that Petitioners' evidence at trial regarding three of the frauds established a violation of RICO. *See infra* at 16-18. The court furthermore acknowledged that each of these frauds was sufficient to support the verdict. "These are not five isolated acts of fraud, but different groups of activity, each comprising multiple acts; if the activities within the group were fraudulent, any one group would reflect multiple 'predicate acts' under RICO." Pet. App. 34a.

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[8] Only two judges sat on the panel. Senior Judge Levin H. Campbell heard argument in the case, "but did not participate in the drafting or the issuance of the panel's opinion." Pet. App. 29a n.*.

The First Circuit nonetheless reversed as to Volvo on the ground "that none of the frauds has been established against Volvo." Pet. App. 34a. The court specifically agreed with "Volvo's main contention * * * that the evidence does not support a finding that Volvo committed predicate acts of mail or wire fraud, a crucial element of plaintiffs' RICO claim." *Id.* at 33a. The court therefore held that Volvo could not be held liable "for violating and conspiring to violate RICO's prohibition on racketeering activity." *Id.* at 32a. We address the First Circuit's conclusions regarding each of Respondents' frauds in turn.

FOB Price. Regarding FOB Price, the First Circuit acknowledged that Petitioners had introduced into evidence "several submissions of Trebol Motors to the tax authorities in which the FOB price reported is substantially lower than the invoice price charged by Volvo." Pet. App. 36a. The court found this evidence sufficient to establish a violation of RICO. "A jury could certainly infer that, absent an explanation, such underreporting – at least if systematic – constituted tax fraud by Trebol." *Id.* at 37a.

But the First Circuit found that Trebol's fraudulent FOB Price submissions could not support a judgment against Volvo, which had not itself engaged "in false reporting of the FOB price to the Puerto Rican Bureau of Excise Taxes." Pet. App. 37a. The court did not deny that the jury could conclude both that the FOB fraud was part of a larger fraudulent scheme by the Respondents and also that Volvo was aware of Trebol's activities. Instead, it reversed because there was no direct evidence that Volvo had *itself* participated in the FOB submissions. "The plaintiffs' tax expert agreed that the duty to pay the excise tax applies to the Puerto Rican importer, not to Volvo. Another expert agreed that he had seen no evidence that Volvo had participated in tax evasion involving FOB prices." *Id.*

Double Invoicing. The First Circuit also concluded that Petitioners' evidence supported the jury's verdict that the Double Invoicing scheme violated RICO. The court

acknowledged Petitioners' proof that "AUM sent Trebol additional invoices for the same vehicles but with different purported prices," and that "Trebol used these inflated invoices to obtain higher inventory financing" and furthermore "calculated its retail prices using the inflated cost as a starting point." Pet. App. 46a. The court specifically found that "a rational jury could conclude that Trebol knew of the actual prices and was defrauding Puerto Rican banks" and possibly also Puerto Rican tax authorities. *Id.*

The First Circuit furthermore acknowledged that Petitioners had introduced evidence of Volvo's involvement in this specific scheme. Thus, the court noted the testimony of plaintiff's expert that "AUM served no legitimate purpose." Pet. App. 47a. Volvo had, in addition, "authorized a transaction in which AUM swapped Trebol's debt to it for equity in Trebol." *Id.* Moreover, "Volvo executed a 'Loan Agreement' whereby Volvo loaned AUM 2.7 million dollars to cover Trebol's debts – a transaction that appears exactly contrary to a guarantor's role," and that at trial, "[w]hy Volvo would have lent money to a guarantor" was not "well explained" by Volvo. *Id.*

The First Circuit nonetheless reversed the judgment against Volvo for lack of evidence that it had participated in the fraud. Pet. App. 48a. Despite the evidence it had just cited, the court concluded that "it would be pure speculation for a jury to conclude that Volvo had any knowledge of the double invoicing scheme. Self-interest gave Trebol reason to participate in such a fraud, but there was little reason for Volvo to do so absent proof – and proof was absent – that Volvo got more than its original invoice price." *Id.*

Disclosure Labels. The First Circuit furthermore concluded that Petitioners had established that the Disclosure Label fraud constituted a violation of RICO. The court explained that the labels "misrepresented what Law 77 intended to be the factory 'cost' of the vehicles to Trebol." Pet. App. 50a. Based on this evidence, the court found that "[d]eliberately overstating this figure would be fraud, and we

need not look far to find a use of the mails in connection with the scheme, namely, Trebol's correspondence with AUM which furnished the inflated CIF figures." *Id.*

But the First Circuit nonetheless concluded that Volvo could not be held liable as a co-conspirator for this RICO violation because "Law 77 imposes the disclosure obligation only upon sellers or dealers," not manufacturers. Pet. App. 50a. The court therefore found that Volvo had not played a "role in the preparation or display of the labels" or known "that AUM was furnishing false figures to Trebol, which Trebol then used in the Law 77 labels." *Id.* Based on its finding that Volvo had not itself committed or agreed to commit two or more RICO predicate acts, the First Circuit concluded "that the evidence was not sufficient, under a proper reading of the law, to impose liability on Volvo." *Id.*

The First Circuit subsequently denied rehearing and rehearing *en banc*. *Id.* at 76a. This Petition followed.

REASONS FOR GRANTING THE WRIT

This Petition presents the prototypical case for a GVR order. The decision below rests squarely on a proposition that this Court has rejected in an intervening decision: *Salinas v. United States* held that a plaintiff need not prove that a RICO co-conspirator such as Volvo agreed to commit two or more RICO predicate acts. There is, moreover, a substantial chance that the First Circuit will enter a different judgment on remand in light of *Salinas*. The court of appeals will consider whether the evidence at trial showed that Volvo "adopt[ed] the goal of furthering or facilitating the criminal endeavor" (*Salinas*, 118 S. Ct. at 477). Importantly, the test will not be whether Volvo's involvement can be proven directly, but instead whether it can be "inferred from words, actions, and the interdependence of activities and persons involved." *Aetna Casualty Surety Co. v. P & B Autobody*, 43 F.3d 1546, 1562 (CA1 1994).

There unquestionably was substantial evidence from which the jury could infer Volvo's involvement in the

conspiracy to defraud. As the district court recounted the evidence at trial, *see supra* at 9, Volvo was heavily involved in all aspects of Trebol's operations, including advertising, training, and sales. Volvo specifically had access to all of Trebol's finances and the power to set prices. Moreover, there was direct evidence of Volvo's involvement in certain aspects of the fraudulent scheme, including the use of AUM as a conduit for money laundering and the provision of blank certificates of origin for the tax authorities.

This Court accordingly should vacate the judgment below and remand for further consideration in light of *Salinas*.

I. *Salinas v. United States* Rejected the First Circuit's Rule That Each RICO Co-Conspirator Must Agree To Commit Two Or More Predicate Acts.

After the close of briefing in the First Circuit, this Court held that each RICO co-conspirator need not agree to commit two or more RICO predicate acts. In *Salinas v. United States*, 522 US 52, 118 S. Ct. 469 (1997), the Court considered an alleged RICO conspiracy in which a sheriff and deputy accepted bribes in exchange for permitting a prisoner to conduct unsupervised visits with his wife and his girlfriend. 118 S. Ct. at 472. The deputy argued that "[t]here could be no conspiracy offense * * * unless he himself committed or agreed to commit the two predicate acts requisite for a substantive RICO offense under § 1962(c)." *Id.* at 476. This Court granted certiorari in order to resolve "a conflict among the Courts of Appeals on the point." *Id.* Specifically,

> Decisions of the First, Second, and Tenth Circuits require that, under the RICO conspiracy provision, the defendant must himself commit or agree to commit two or more predicate acts. *See* * * * *United States v. Winter*, 663 F.2d 1120 (CA1), *cert. denied*, 460 U.S. 1011 (1983). Eight other Courts of Appeals, including the Fifth Circuit in this case, take a contrary view.

Id. (citations omitted).

This Court unanimously rejected the deputy's contention, and thus the Rule applied by the First Circuit in this case, holding that each co-conspirator need *not* agree to commit two or more RICO predicate acts. *Salinas* emphasizes the "comprehensive" breadth of the RICO conspiracy provision, which contains "no requirement of some overt act or specific act * * * unlike the general conspiracy provision applicable to federal crimes." 118 S. Ct. at 476. In addition, it has long been settled that

> [i]f conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators. As Justice Holmes observed: "Plainly a person may conspire for the commission of a crime by a third person." *United States v. Holte*, 236 U.S. 140, 144 (1915).

Id. at 477. While acknowledging that the underlying RICO provision (18 USC 1962(c)) provides that the defendant must have committed two or more RICO predicate acts, the Court explained that "[t]he interplay between subsections (c) and (d) does not permit us to excuse from the reach of the *conspiracy* provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense." *Id.* at 478 (emphasis added).

The Court then articulated the plaintiff's burden of proof in establishing a RICO conspiracy:

> A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, *but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor*. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense.

118 S. Ct. at 477 (emphasis added); *see also id.* ("[S]o long as the purpose of the agreement is to facilitate commission of a crime, the actor need not agree 'to commit' the crime." (quoting American Law Institute, Model Penal Code, Tentative Draft No. 10, p. 117 (1960)).

II. The First Circuit's Judgment In This Case Must Be Vacated And Remanded In Light Of *Salinas*.

A. The Judgment Below Squarely Conflicts With *Salinas*.

The decision below rests precisely on the rule rejected by this Court in *Salinas v. United States*, 522 US 52, 118 S. Ct. 469 (1997). According to the First Circuit, there was insufficient evidence that "*Volvo* committed predicate acts of mail or wire fraud, a crucial element of plaintiffs' RICO claim." Pet. App. 33a (emphasis added). That holding reflects long-settled First Circuit precedent, on which both Petitioners and Respondents relied. But after the close of briefing on appeal, this Court held directly to the contrary, adopting the majority rule in the circuits that each co-conspirator need not commit or agree to commit two or more RICO predicate acts. *Salinas v. United States*, *supra*, 118 S. Ct. at 478. On remand, the First Circuit will be in a position to determine whether Petitioners' claim satisfies the standard articulated in *Salinas*: whether Volvo "adopt[ed] the goal of furthering or facilitating the criminal endeavor." *Id.* at 477.

The First Circuit's failure to account for *Salinas* is understandable. *Salinas* was not decided until the date of oral argument in the First Circuit, well after the briefing in the case was completed, and the parties did not otherwise bring *Salinas*' holding to the attention of the court of appeals. Moreover, the First Circuit's decision reflects that court's long-embedded precedent, reaching back nearly two decades, which neither party disputed. *See supra* at 11-12 (quoting and citing the parties' briefs on appeal). In particular, over the past decade, one or both of the judges who decided this case participated in *all ten* of the First Circuit's decisions

reiterating that each RICO co-conspirator must agree to commit two or more RICO predicate acts. *See supra* n.5. Now that this Court firmly has concluded that the First Circuit's standard is erroneous, the appropriate course is to remand for further consideration.

Although the First Circuit ultimately may reach the same holding on remand, there is a substantial chance that it will enter a different judgment. The decision below rests on the absence of evidence regarding Volvo's direct participation in individual RICO predicate acts. Thus, the First Circuit found insufficient proof that Volvo *itself* submitted false FOB and disclosure labels or participated in the AUM fraud. Pet. App. 37a-48a. But the court of appeals did not doubt the jury's findings that the individual predicate acts were part of a larger fraudulent scheme and that Volvo facilitated that scheme, which would be a sufficient basis to affirm the judgment as to Volvo. Even if the court of appeals on remand finds that Petitioners' evidence is insufficient to establish Volvo's liability, it will have to decide whether to order an entirely new trial under the standard articulated in *Salinas*, given that the first trial proceeded under the First Circuit's erroneous precedent.

Moreover, the First Circuit will apply a substantially different standard of proof on remand. The decision below rests on the absence of direct proof that Volvo participated in RICO predicate acts. On remand, however, the test will be whether Volvo's "knowing participation" in the fraud – *i.e.*, whether Volvo "adopt[ed] the goal of furthering or facilitating the criminal endeavor" (*Salinas*, 118 S. Ct. at 477) – can be established by *inference*. Under settled First Circuit precedent, "[I]t is not necessary for the conspiratorial agreement to be express, so long as its existence can plausibly be inferred from words, actions, and the interdependence of activities and persons involved." *Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1562 (CA1 1994).

Petitioners' evidence at trial was more than sufficient to support an inference of Volvo's participation in the fraudulent

scheme. The district court, which heard all of the evidence in the case and was in a position to evaluate the credibility of witnesses, detailed Volvo's heavy participation in all aspects of Trebol's business, including "sales," "advertising," "training," and "financial assistance." Pet. App. 4a.

Volvo and Trebol furthermore had a very unusual "open book" partnership that granted Volvo access to all of Trebol's finances. Repeated meetings addressed sales, marketing, communications, advertising, and pricing, and the evidence showed that Volvo was the dominant partner with the power to decide marketing, pricing, and sales issues. *See supra* at 9-11. Volvo's knowing participation in the scheme also properly is inferred from its close monitoring of Trebol's sales and showroom activities, its knowledge of the use that Trebol made of the invoices and disclosure labels, and its own use of the retail prices paid by Trebol's customers. Moreover, Volvo was heavily involved in the dummy Liechtenstein company, AUM, which served only to launder proceeds arising from false factory invoices. The opinion below frankly acknowledges that Volvo failed to explain either why such an intermediary was used in Puerto Rico but no other market or why Volvo extended a loan to its own "guarantor." Pet. App. 48a. In light of this evidence and the jury's verdict, there truthfully can be little question that Volvo "facilitated" (*Salinas*, 118 S. Ct. at 477) the fraud of its co-defendants.

B. GVR will clarify whether plenary review should be granted.

The First Circuit's decision also will help this Court determine whether to address several other issues raised by this case. Among other things, Volvo's co-defendants have filed a Petition for Certiorari asserting a right to a jury hearing on damages. No. 98-1092, *Gonzalez-Navarro v. Bonilla*. The court of appeals held that the judge should decide the question of damages, in part, because it did not contemplate that there would be a further jury trial as to Volvo's liability (Pet. App. 70a), which may no longer be true after remand. In addition, as to one of the allegations of fraud, the decision below rests

on the alternative holding that Petitioners lacked standing because they had not been injured by a RICO predicate act (Pet. App. 38a (citing 18 USC 1964(c))), a holding that conflicts with decisions of several other circuits. *See* No. 97-1507, *Teel v. Khurana*, 130 F.3d 143 (CA5 1997), *vacated and remanded as moot*, 119 S. Ct. 442 (1998). Finally, the First Circuit held that the district court's entry of judgment against Trebol was not a "ministerial act" immune from the automatic stay provisions of the Bankruptcy Code and therefore vacated that aspect of the judgment. Pet. App. 72a. That holding squarely conflicts with decisions of the Second and Fourth Circuits. *Rexnord Holdings v. Biderman*, 21 F.3d 522, 527 (CA2 1994) ("While the commencement or continuation of a judicial action or proceeding clearly is subject to the automatic stay of section 362, we do not believe that the simple and 'ministerial' act of the entry of a judgment by the court clerk constitutes the continuation of a judicial proceeding under section 362(a)(1)."); *In re Knightsbridge Devel. Co.*, 884 F.2d 145, 148 (CA4 1989).

C. GVR is appropriate based on the timing of this Court's decision in *Salinas*.

In determining whether to remand for further consideration, it makes no difference that the decision below post-dates this Court's decision in *Salinas*. No jurisdictional "time limit" applies to GVR orders. Instead, the question is whether the First Circuit failed to account for *Salinas* in making its decision, which clearly it did. *Salinas* was decided after the close of briefing on appeal, and the First Circuit failed to acknowledge its crucial effect on the parties' contentions.

This Court consistently vacates and remands lower court decisions that fail to account for pre-existing precedents. For example, the Court remanded No. 90-524, *Connecticut v. Geisler*, in light of *New York v. Harris*, 495 US 14 (1990), which had been decided three weeks before the lower court's decision. *See* 498 US 1019 (1991). To the same effect is No. 90-1936, *Parker Solvents v. Royal Ins. Cos. Of Am.*, 502 US

801 (1991), a GVR in light of *Salve Regina College v. Russell*, 499 US 225 (1991), which had been decided a few days before the lower court's decision.[9] In fact, the Court several times has GVR'd lower court decisions based on *years*-old Supreme Court precedents. *E.g.*, No. 97-5901, *Hodgkiss v. United States*, 118 S. Ct. 597 (1997) (GVR based on *Bailey v. United States*, 516 US 137 (1995), decided two years before court of appeals' decision); No. 89-5991, *Patterson v. South Carolina*, 493 US 1013 (1990) (GVR based on *Griffith v. Kentucky*, 479 US 314 (1987), decided two-and-a-half years before state supreme court's decision); No. 89-401, *Wecht v. Inmates of Allegheny County*, 493 US 948 (1989) (GVR based on *University of Texas v. Camenisch*, 451 US 390 (1981), decided eight years before court of appeals' decision).

Given that this Court in *Salinas* squarely rejected the basis for the decision below, the judgment should be vacated and the case remanded for further consideration.

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[9] More recently, this Court vacated and remanded two decisions of the Minnesota Court of Appeals for further consideration in light of *Kansas v. Hendricks*, 521 US 346 (1997), even though the state court had decided those cases several months after this Court decided *Hendricks*. No. 97-8284, *Schweninger v. Minnesota*, 142 L.Ed.2d 25 (1998); No. 97-7931, *Coleman v. Minnesota*, 118 S. Ct. 2318 (1998).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted, the judgment vacated, and the case remanded for further consideration in light of *Salinas v. United States*, 522 US 52 (1997).

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS BONILLA, et al.	*	
	*	
	*	
Plaintiff	*	
	*	CIVIL NO.
	*	92-1795(JP)
vs.	*	
	*	
TREBOL MOTORS	*	
CORPORATION, et al.	*	
	*	
Defendant	*	

OPINION AND ORDER ON
MOTION FOR NEW TRIAL

The Court has before it defendant Volvo Car Corporation's post-verdict motion for judgement as a matter of law, for a new trial, or in the alternative, for remittitur, and plaintiffs' opposition (docket Nos. 819 and 869). For the following reasons, defendant's motion is hereby DENIED.

I. INTRODUCTION

This is a class action alleging violations of the Organized Crime Control Act know as Racketeer Influenced and Corrupt Organizations ("RICO"), 18 U.S.C. §§ 1962, et seq. Plaintiffs are approximately 9,000 Puerto Rican consumers who purchased Volvo vehicles of the 200 series from defendants during a ten year period. Defendants are Volvo Car Corporation ("Volvo"), the foreign manufacturer of the vehicles, Trebol Motors Corporation and Trebol Motors Distributor Corporation ("Trebol"), the entities which imported and distributed the Volvo vehicles to the consumers in Puerto Rico, and Ricardo Gonzalez and Conchita Navarro

de Gonzalez ("Gonzalez codefendants"), the principals of Trebol.

Plaintiffs alleged that all defendants engaged in an elaborate scheme to defraud consumers of Volvo vehicles of the 200 series in Puerto Rico, from 1983 to 1993, which used the mails and wires, in violation of 18 U.S.C. §§ 1962 (a), (c), and (d). After four years of contentious pretrial, on Friday afternoon prior to the start of trial on Monday, June 24, 1996, the Trebol and Gonzalez codefendants consented to the entry of default and notified that they would not appear at trial to defend themselves. This Court denied Volvo's motion for a continuance or a severance, and proceeded as scheduled with the bifurcated trial against Volvo as the sole defendant.

On July 25, 1996, the jury returned a verdict in the form of special interrogatories finding that there were two RICO "enterprises": the first one was comprised solely of Trebol Motors Distributors Corporation, and the second enterprise was comprised of Trebol Motors Distributor Corporation, Trebol Motors Corporation, Ricardo Gonzalez, Conchita Navarro de Gonzalez and Volvo. Next, the jury found that Volvo intentionally engaged in a pattern of racketeering activity through mail or wire fraud in violation of 18 U.S.C. § 1962(c) and conspired with Trebol to engage in the scheme to defraud, in violation of 18 U.S.C. § 1962(d) which caused injury to plaintiffs' business or property. Furthermore, the jury found that Volvo had derived income from the pattern of racketeering activity and invested that income in the furtherance of the enterprise in violation of 18 U.S.C.§ 1962(a). Nevertheless, the jury found that plaintiffs had not experienced any injury to their business or property as a result of this violation.

On July 30, 1996, the jury awarded plaintiffs an aggregate amount of $43,197,100.00, which this Court trebled pursuant to 18 U.S.C. § 1964(c). Thereafter, this Court entered judgement against defendant Volvo in the amount of $129,591,300.00 plus costs and attorneys' fees.

Volvo has filed an omnibus post-trial motion raising a host of issues, and requesting that the judgment be set aside and that as a matter of law judgment be entered in favor of Volvo, or that this Court grant a new trial, or in the alternative, they requested a remittitur. After due consideration of Volvo's arguments, the motion for a new trial is hereby **DENIED.**

II. STANDARD FOR A MOTION FOR A NEW TRIAL

Rule 59 of the Federal Rules Of Civil Procedure broadly permits a trial court to order a new trial, based upon the motion of a party or upon the Court's own initiative, "for any of the reasons for which new trials have heretofore been granted." Fed. R. Civ. P. 59(a). Some of the reasons for which new trials have been granted include claims that "the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury," Cigna Fire Underwriters v. MacDonald & Johnson, 86 F.2d 1260, 1262-63 (1st Cir. 1996) (citing Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940)).

The decision whether to grant a motion for a new trial lies within the discretion of the trial court. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980). However, trial courts shall exercise their discretion in favor of granting a new trial sparingly since "a jury's verdict on the facts should only be overturned in the most compelling circumstances." Wells Real Estate, v. Greater Lowell Board of Realtors, 850 F.2d 803, 811 (1st Cir.), cert. denied, 488 U.S. 955 (1988).

Even if the trial court could have reached a verdict opposite from the jury, the court shall not upset a jury verdict which is based on the evidence presented at trial. Velaquez v. Gomez, 996 F.2d 425, 428 (1st Cir.), cert denied, 510 U.S. 993 (1993). A trial court shall order a new trial "only if the verdict, though rationally based on the evidence, 'was so

clearly against the weight of the evidence as to amount to a manifest miscarriage of justice,'" Fernandez v. Corporation Insular de Seguros, 79 F.3d 207, 211 (1st Cir. 1996) (citation omitted).

III. DISCUSSION

A. WEIGHT OF EVIDENCE

Volvo argues that the verdict is not supported by the weight of the evidence as it relates both to the issue of proximate cause and damages. Volvo contends that there is no evidence that the elements of fraud underlying the allegations of Volvo's violations of RICO activity caused plaintiffs' injuries. Moreover, Volvo argues that the measurement of damages as the difference between the purchase price of the class vehicles and the value or the price differential, is incorrect.

Evidence was presented at trial that Trebol codefendants are the sole importer and distributor of Volvo vehicles on the island of Puerto Rico. The partnership between Volvo Car Corporation and Trebol extended beyond a mere contractual relationship. In addition to selling Trebol the Volvo vehicles, Volvo provided Trebol with assistance in advertising the vehicles, training the personnel, and financial assistance in certain instances. Representatives of Volvo visited Trebol's business facilities in Puerto Rico, several times a year, and representatives of Trebol traveled to Sweden or Spain for meetings with Volvo. In between the personal meetings between representatives of the two entities, representatives of Volvo and Trebol communicated with each other continuously over the telephone and fax. During the relevant time period, sales of Volvo vehicles in Puerto Rico exceeded approximately $600 million. A Volvo representative testified that the success of Trebol was Volvo's best guarantee of its own prosperity.

Five aspects of the partnership between Volvo and Trebol in the sale of vehicles in Puerto Rico form the foundation of plaintiffs' allegations that Volvo engaged in a scheme to defraud consumers of 200 series vehicles. First,

Trebol changed the emblems of approximately twenty percent (20%) of the class vehicles from the DL to the GLE emblem with Volvo's authorization and approval. The GLE emblem identifies the model as the one with the highest level of specification or luxury at any given time. Trebol ordered the vehicles through the use of a variant code which identified all the vehicles as either GL or DL models. The standards and specifications of the different models varied for each year, and varied within the year. Once the vehicles arrived in Puerto Rico, Trebol modified the vehicles by adding "port additions," and replaced the DL emblem already attached to the automobile with a GLE emblem. In certain instances, the vehicles sold with the GLE emblem included power package, 15 inch wheels, metallic paint and leather seats, which were not included in the DL models. However, in other instances, the only difference between a GLE and DL model was the set of 15 inch wheels. Nevertheless, the purchase price of the GLE model was substantially higher than that of a DL model.

Second, federal and Commonwealth automobile disclosure statutes, the Monroney Act, 15 U.S.C. § 1231 et seq., and Law 77, 23 L.P.R.A. 1021, et seq. respectively, require the manufacturers and dealers to affix stickers to windows of new automobiles. The federal statute required the manufactures to disclose relevant information including the make, model, serial or identification numbers of the vehicle, the final assembling point, the retail delivered price for each accessory, and the retail price of such automobile suggested by the manufacturer. The commonwealth statute requires automobile dealers to place a sticker on the window of new cars disclosing the make and model of the vehicle and the factory cost of the vehicle. The stickers of the plaintiffs' vehicles did not itemize the options and accessories for each vehicle or model and the corresponding costs. The MSRP was established by Trebol, not Volvo, as one global price for the vehicle which included all options and accessories for that particular vehicle.

Third, Volvo used a unique billing system for Puerto Rico by sending one invoice per vehicle to Trebol in Puerto

Rico which reflected one Free on Board ("FOB") price, and sent a copy of the same invoice to Auto Und Motoren ("AUM") in Liechtenstein. Thereafter, AUM sent a second invoice to Trebol which reflected an inflated FOB price. The vehicles never traveled to Liechtenstein, nor did AUM perform any manufacturing activities on the vehicles. Defendants asserted that AUM was the financial guarantor for the sale of the Volvo vehicles to Trebol, however, Volvo provided a $3 million dollar loan, or guarantee to AUM. Plaintiffs' expert testified that AUM served no legitimate business purpose.

Fourth, Volvo sent certifications of the weight and horsepower of the various vehicles Terbol to be forwarded to the Department of the Treasury for the commonwealth of Puerto Rico ("Treasury") for the calculations of the excise taxes. Pursuant to Trebol's request, Volvo calculated the horsepower pursuant to a formula which had been disclaimed by the automobile industry, and replaced by a new formula. Because of the use of this formula, the excise tax on the vehicles was calculated at 107 horsepower and the corresponding 19 percent excise tax, instead of 114 horsepower at 30 percent tax. Nevertheless, Trebol used the measurement of the higher horsepower calculated by the formula accepted by the automotive industry provided to the consumer and to other governmental entities for other purposes. There was no law or regulation requiring Volvo to use the new formula until 1989, and the certifications specified the formula which Volvo used to calculate the horsepower. Nevertheless, a former employee of the Treasury testified that due to the number and complexity of the information processed at Treasury, employees relied upon the good faith of the manufacturers to voluntarily comply with industry standards for the preparation of horsepower certifications.

Representatives from Volvo testified that a factor in the success of Trebol, and consequently the success of Volvo, was the strength of the competition. Several witnesses testified that the other vehicles from the European market, such as

BMW and Audi did not present any competition to Volvo during this time period. A factor in Trebol's success included their ability to avoid excise taxes. In a letter, Volvo discussed with Trebol the hidden potential from tax savings.

Fifth, on the issue of overpricing, representatives from Volvo testified that Volvo considered a variety of factors when establishing the sale price of the vehicles to Trebol, including the retail price which Trebol would charge to consumers was the amount that the customer was willing to pay. Furthermore, a representative from Volvo testified that a customer's willingness to pay depended upon the information which the consumer had been provided concerning the vehicle. Named plaintiffs testified that they did not have complete information concerning the vehicles which they had purchased, and that if they had obtained such information prior to their purchase, they would not have purchased the vehicles they did at the purchase price which they paid.

Volvo in its defense presented evidence that as an international corporation manufacturing a quality car in Sweden, and selling cars throughout the world, it engaged in the business practice of choosing one sole importer per market in order to ensure the best quality of service to the consumer. In Puerto Rico, Volvo had chosen Trebol as the importer. Volvo denied that any aspect of its business practice with Trebol constituted a scheme to defraud. Furthermore, Volvo argued that Trebol was the taxpayer in Puerto Rico; that Trebol was responsible for affixing the stickers to the window of the vehicles; and that Trebol engaged in the business relationship with AUM. Thus, Volvo should not be held liable for Trebol's activities. Volvo representatives testified that they were unaware of several of Trebol's actions. Finally, Volvo represented an expert witness who testified that plaintiffs had not overpaid for the value of their vehicles.

Based on the conflicting evidence, the jury determined that certain witnesses were more credible than others, and accorded more weight to certain testimony. Since the jurors are the ultimate triers of fact, the trial court shall be especially

reluctant to order a new trial when the verdict rested upon the jury's determination of the credibility of witnesses. Rios v. Empresa Lineas Maritmas Argentinas, 575 F.2d 986, 990 (1st Cir. 1988). The jury's verdict determining that Volvo had engaged in a scheme to defraud using the mails and wires, and that plaintiffs were injured as a result of this scheme is well supported by the evidence.

1. Proximate Cause

Volvo attacks each separate element of the allegations underlying the scheme to defraud. First, Volvo argues that as a matter of law, the federal automobile disclosures statute does not apply to a foreign manufacturer of vehicles, and therefore, admission of evidence concerning the compliance of the stickers with the disclosure statutes constituted prejudicial error.

Plaintiffs in the case at bar, however, alleged that Volvo had engaged in a scheme to defraud using the mails and wires in violation of RICO. This case did not involve a cause of action for violation of the Monroney Act. "The [mail fraud] statute does not merely forbid the use of the mails to perpetrate an act made criminal by state or federal law; it reaches any plan, consummated by the use of the mails, in which artifice or deceit is employed to obtain something of value with the intention of depriving the owner of this property," U.S. v. Kreimer, 609 F.2d 126, 128 (5th Cir. 1980). Therefore, whether the stickers violated the disclosure statues is not dispositive of the question of whether Volvo engaged in a scheme to defraud consumers of Volvo vehicles. Evidence of the existence of these statutes, and evidence of whether the stickers complied with the statutes was relevant and admissible to the question of whether Volvo was using artifice or deceit to obtain a higher purchase price with the intention of depriving plaintiffs of their money.

Likewise, each other aspect of the scheme to defraud was not essential to prove that Volvo engaged in a scheme to defraud with Trebol, yet all of those elements from the foundation of plaintiffs' allegations. Cumulative evidence

might prove what one piece of evidence in isolation does not prove. U.S. v. Sawyer, 85 F.3d 713, 734 (1st Cir. 1996) (citing U.S. v. Ortiz, 966 F.2d 707, 711 (1st Cir. 1992)). Therefore, the weakness of any one aspect of the scheme does not detract from the quantity of evidence as to the whole scheme. "[T]he scheme is not to be measured by technicalities," U.S. v. Lindsey, 736 F.2d 433, 436 (7th Cir. 1984). Nor does the fact that Trebol might have been the primary actor detract from the fact that plaintiffs alleged that Volvo conspired with Trebol to engage in the scheme to defraud. A "conspirator is responsible for offenses committed by his fellow conspirators," Brunswick Corp. v. E.A. Doyle Mfg. Co., 770 F. Supp. 1351, 1372 (E.D. Wis. 1991) (citations omitted). The totality of evidence presented at trial was sufficient for the jury to conclude that Volvo engaged in a scheme to defraud, and conspired with Trebol to engage in the scheme to defraud consumers of Volvo vehicles in Puerto Rico, in violation of RICO. Moreover, the evidence is sufficient to sustain the jury's verdict that plaintiffs' injuries were caused by Volvo's participation in the RICO enterprise's affairs through a pattern of racketeering activity, in violation of § 1962(c) and conspiracy with Trebol, in violation of § 1962(d). Sedima v. Imrex Co. Inc., 473 U.S. 479, 496 (1985).

2. Damages

Volvo next argues that even assuming that plaintiffs suffered injury, plaintiffs' expert witness's calculation of the difference between the purchase price of the vehicles and their respective value is an improper measure of damages. "With respect to the issue of how accurately damages must be measured, 'there is a clear distinction between the [relatively high] measure of proof necessary to establish that [a plaintiff] has sustained some damage and the [relatively low] measure of proof necessary to enable the jury to fix the amount," Coastal Fuels of P.R. v. Caribbean Petroleum, 79 F.3d 182, 200 (1st Cir. 1996) (citing Stony Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931)). The evidence presented in the case at bar was a sufficient measure

of proof to allow the jury to adequately fix the amount of damages.

Plaintiffs' expert witness, Dr. Lewis Koppel, performed an analysis of the difference between the purchase price plaintiffs paid for their vehicles, set off by the value of the vehicle. Koppel began his calculation by taking the list price of a comparable vehicle being sold in the southeastern United States as a benchmark for determination of the fair market value of plaintiffs' vehicles, and increasing that amount by the value of the options and accessories added to plaintiffs' vehicles. The use of the list price of Volvo vehicles being sold in Florida was an appropriate approximation of the value of the class vehicles. The specifications of the vehicles sent from Volvo to Trebol in Puerto Rico were exactly the same as the specifications of the vehicles sent from Volvo to the southeastern United States, and the variant codes for the 200 series vehicles from which the US importer and the Puerto Rican importer would order from Volvo in Sweden were exactly the same.

Volvo disputes Koppel's qualifications as an expert witness and claims that his methodology was flawed. These arguments, however, were presented to the jury since they reflected on the credibility, not the admissibility, of Koppel's testimony. Koppel had calculated the aggregate amount of plaintiffs' damages at $63,584,000.00. That figure constituted the "upper edge of the universe of sustainable awards," Dopp v. Pritzker, 38 F.3d 1239, 1249 (1st Cir. 1994). On cross-examination Koppel testified that he had not taken into consideration the difference in the applicable excise taxes in Puerto Rico and Florida. Furthermore, Koppel agreed that if he had calculated the difference in the applicable excise taxes at approximately $3,000.00 per vehicle, his original calculation would have overestimated the aggregate amount of damages by approximately $27 million. Therefore, the jury's reduction of plaintiffs' expert witnesses' calculations by approximately $20 million, and final award of approximately $43 million is a reasonable assessment of the amount of damages suffered by plaintiffs, and based upon an adequate

evidentiary predicate. Consequently, the jury verdict is not an example of impermissible resort to speculation and surmise. Id. at 1250.

B. ISSUES REGARDING ADMISSION AND EXCLUSION OF EVIDENCE

Rule 611 of the Federal Rules of Evidence provides in pertinent part:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time. . .

It is well settled that the admission and exclusion of evidence is primarily within the discretion of the trial judge. Blinzler v. Marriott Intern., Inc., 81 F.3d 1148, 1158 (1st Cir. 1996).

1. Demonstrative Evidence

Volvo contends that this Court erred in precluding the admission of two pieces of demonstrative evidence: a Volvo Vehicle model, and a display of genuine Volvo parts for the years between 1984 and 1993.

On July 19, 1996, following the testimony of Basilio Velez, the comptroller of Trebol, Volvo proposed to take the Jury on a field trip to perform a visual inspection of a Volvo vehicle. This "mock up" Volvo vehicle was not an actual automobile that a customer, especially any plaintiff, could have ever purchased from any defendants. Volvo has created this mock up for purposes of this litigation by combining parts and accessories from various models available over the various years. This multi-color, multi-textured paint, multi-option and multi-accessory hypothetical model demonstrated the potential varieties of hypothetical vehicles over the relevant time period, but was irrelevant to the question of whether or not Volvo engaged in a scheme to defraud using the mails and wires. The model was unreliable, and it would

confuse the jury rather than serve to clarify salient facts. Moreover, the field trip to view the mock up would have been a needless consumption to time, and would not have served to ascertain the truth.

Likewise, presentation of the displays of the genuine Volvo parts and accessories which were added to plaintiffs' vehicles would have needlessly consumed time. There was no dispute in the case at bar that the options and accessories which were installed in the factory or by Trebol in Puerto Rico were genuine Volvo equipment.

2. Basilio Velez's Testimony

Prior to the testimony of Basilio Velez, the comptroller of Trebol, this Court ruled that Velez would be allowed to testify as to matters within his personal knowledge. Velez would be prohibited, however, from testifying about matters beyond the scope of his employment at Trebol. Rule 602 of the Federal Rules of Evidence provides that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge to the matter."

During direct examination, Velez testified about how Volvo vehicles arrived in the port in Puerto Rico and which port additions were installed on the vehicle of the class members during the relevant time period. Nevertheless, this Court did not allow Velez to testify about the decision to order one model (DL) as opposed to another (GL) and then to add port additions, the decision on what retail price to charge consumers, decisions about what information was included on the stickers, and an alleged audit concerning the stickers. Volvo contends that the Court's ruling precluding this testimony was erroneous.

As comptroller of Trebol, Velez was in charge of Bookkeeping functions. Velez did not participate in making executive decisions. Therefore, the testimony concerning the other issues is beyond the scope of his personal knowledge, and consequently inadmissible.

3. Joey Fuentes' Testimony

Volvo has stated several objections in relation to the testimony of plaintiffs' expert witness, Joey Fuentes. Plaintiffs had proposed calling Fuentes as an expert in accounting, and as an expert on the applicability and compliance of the automobile disclosure laws. Nevertheless, at trial, this Court only qualified Fuentes as an expert in accounting, and not on the subject of automobile disclosure laws. Fuentes testified on a limited basis about the stickers since he had studied these stickers in preparing his opinion on the issue of the amount by which each individual plaintiff had been overcharged. Therefore, Fuentes did not testify as an expert on automobile disclosure statutes and there was no error in the admission of his testimony.

4. Evidence Which Had Not Been Premarked

Volvo contends that the Court erroneously admitted certain pieces of evidence which had not been properly marked for identification purposes during the pretrial, marking procedure. Volvo's contention is mistaken. This Court admitted into evidence portions of a document which had been premarked in its entirety. The premarking of the entire document was sufficient to place Volvo on notice that plaintiffs would seek to introduce into evidence a smaller subset of any entire premarked document. As to a second group of documents, the Court initially admitted several documents into evidence which had been premarked, then later struck those exhibits from evidence. Therefore, Volvo's argument if directed as documents which were admitted but later stricken from evidence is meritless.

5. Document Depository

At the onset of trial, Volvo raised an objection to the authenticity of a document being introduced into evidence by plaintiffs. In response, this Court ruled that any document which was one of Trebol's business records, which had been produced to plaintiffs by Trebol or Gonzalez codefendants during discovery, and which had been stored in a document depository created specifically for this litigation was

presumptively authentic. See U.S. v. Goichman, 547 F.2d 778, 783 (3rd Cir. 1976) (once a movant has made a prima facie case to the court of the authenticity of a document, the document is admitted for the jury to determine its authenticity). Nevertheless, this Court ruled that Volvo could object to the documents based upon any other ground under the Rules of Evidence. Thus, Volvo's argument that this Court automatically admitted any document which had been presented in the document depository even if the document was irrelevant, is erroneous.

6. Failure to Recall Witnesses

Volvo claims that this Court committed prejudicial error by precluding Volvo from recalling plaintiffs' expert witnesses after this Court withdrew the sanction of allowing the jury to reach a negative inference based upon Volvo's failure to comply with discovery requests. These experts have already testified fully and Volvo had been allowed to cross-examine them. Recalling these witnesses would have been a needless consumption of time.

C. DENIAL OF MOTION FOR CONTINUANCE AND SERVICE

Volvo asserts that the Court's denial of the motion for continuance and severance following Trebol and Gonzalez codefendants' consent to entry of default on the eve of trial constituted error. Volvo has failed to articulate a reason why a continuance of the trial date would have made a difference, nor how Volvo was prejudiced by the denial of the motion for continuance and severance.

When considering a motion for continuance, a trial court should take into consideration and weigh the following factors: the reason for the request for continuance, complexity of the case, whether the movant has contributed to the need for the continuance, the inconvenience to the others including the court, witnesses, and the opposing party, and the likelihood of prejudice to the movant if the continuance is not granted. F.D.I.C v. Houde, 90 F.3d 600, 608 (1st Cir. 1996) (citation omitted).

This was a class action alleging five aspects of a scheme to defraud about 9,000 individuals over a ten year period, which raised complex legal issues during a lengthy and contentious pretrial phase, which resulted in a case volume involving more than 698 docket entries as of June 24, 1996, the date trial began. Trebol and Gonzalez codefendants consented to the entry of default against them at 4:27 p.m. on the Friday prior to the start of the trial. Throughout the pretrial phase of this case, Trebol, and Gonzalez and Volvo codefendants had presented a common defense, using the same witnesses, similar documentary evidence, and similar legal arguments in their defense. Therefore, Volvo should have been prepared to continue in their absence.

Postponing the trial date would have added substantial cost and delay to the proceedings in the case at bar. Although the jury had not been impaneled by the time of Volvo's motion for continuance, there were 100 individuals who had been called for the voir dire panel to perform their jury duty service on the date of trial. Volvo's vague allegations that it experienced prejudice would have not been cured by a continuance of the trial, or the severance of a trial involving allegations of conspiracy.

D. PREJUDICIAL CONDUCT OF JUDGE

Volvo reiterates the allegations contained in its previous motion for mistrial and recusal based upon the imposition of sanctions, and further asserts that this Court created a hostile atmosphere for defendants throughout the duration of the pretrial and trial proceedings. Volvo finds fault with this Court's comments to the lawyers during bench conferences, some comments in open court, a sanction imposed and later removed, permission of plaintiffs' attorney's conduct of the examination of witnesses, and error in deciding the motion for mistrial.

During trial, this Court denied Volvo's motion for mistrial which raised several of these same issues. After further consideration of Volvo's argument, this Court finds that there was no error in the questions or comments of this

Court. See Kramer v. U.S., 408 F.2d 837, 841 (8th Cir. 1969) (court "may ask questions and had prerogative of commenting directly on witnesses and their testimony") and Cigna Fire Underwriters v. MacDonald & Johnson, 86 F.2d 1260, 1270-72 (1st Cir. 1996) (comments by the judge during a pre-trial hearing in an attempt to settle the case would not create a reasonable doubt concerning the judge's impartiality in the mind of a reasonable person). Comments of the judge must be viewed in their complete context to determine what effect those comments may have on the jury. Goichman, 547 F. 2d at 784. The record, recopied substantially in Volvo's motion and plaintiffs' opposition, speaks for itself.

In addition, Volvo asserts that this Court committed error by failing to interrupt the trial to take the deposition of an individual concerning allegations which are under seal. There was no error in this Court's decision. Suspension of the proceedings in the middle of trial to investigate ambiguous allegations lacking any evidentiary foundation, and directly contradicted by evidence in the record, would have made a mockery of the judicial system.

E. JURY INSTRUCTIONS, VERDICT AND RESPONSE TO JURY QUESTION

Volvo asserts that the jury instructions on liability and damages, verdict on liability and damages, and the Court's response to the jury's questions during deliberations constitute prejudicial error. After due consideration of the issues raised and a review of the record, this Court finds that there was no error in the jury instructions taken as a whole, the verdicts, or this Court's refusal to read portions of the transcript to the jury.

F. ALLEGED ERRORS IN PRETRIAL ORDERS

Volvo insists that this Court engaged in prejudicial error in the disposition of the following pretrial matters: 1) identification and certification of the class, 2) failure to dismiss the Second Amended Complaint, and 3) denial of Volvo's motions in limine to exclude plaintiffs' experts. Volvo reiterates allegations that this Court erroneously denied

its previous motions. Volvo's arguments do not raise any new contentions, therefore, this Court will not address these issues further.

IV. CONCLUSION

Based upon all the evidence presented at trial and the parties arguments, the Court does not find that allowing the jury verdict to stand would constitute a miscarriage of justice, nor that Volvo is entitled to judgment as a matter of law.

Therefore, defendants motion for a new trial is hereby DENIED.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 7th day of October, 1996

/s/

JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS BONILLA, et al.	*	
	*	
	*	
Plaintiff	*	
	*	CIVIL NO.
	*	92-1795(JP)
vs.	*	
	*	
TREBOL MOTORS	*	
CORPORATION, et al.	*	
	*	
Defendant	*	

ORDER

The Court has before it the motion of defendants Ricardo Gonzalez Navarro and Conchita Navarro de Gonzalez ("Gonzalez codefendants") requesting the Court to vacate judgment and enter judgment in their favor (**docket No. 922**), and plaintiffs' response thereto. The Court hereby **DENIES** the Gonzalez codefendants' motion as well as the motion of Trebol Motors Corporation and Trebol Motors Distributor Corporation ("Trebol codefendants") adopting the Gonzalez codefendants' motion (**docket No. 921**)[1]

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[1] Trebol Motors Corporation and Trebol Motors Distributor Corporation ("Trebol codefendants"), in a motion styled "Motion Under Rule 59," adopted all arguments in this Motion to Vacate filed by the Gonzalez codefendants except those arguments pertaining to the Gonzalez codefendants' lack of an affirmative duty to disclose under the Act to Protect Motor Vehicle Buyers in Puerto Rico, 23 L.P.R.A. § 1201, and the Automobile Information Disclosure Act, 15 U.S.C. § 1201. The Court has already addressed the other arguments in the Trebol's Motion Under Rule 59 in its Order of November 8, 1996. However, because the Trebol

The Gonzalez motion regurgitates arguments made by other codefendants and the Gonzalez codefendants themselves in prior motions, all of which the Court has rejected. Therefore, the Court takes a somewhat summary approach to explaining its denial of the Gonzalez codefendants' motion in this Order.

First, the Gonzalez codefendants question whether this Court's October 7, 1996 Final Judgment is actually a final judgment under Rule 54(a). It is. It does not "contain a recital of the pleading, the report of a master, or the record of prior proceedings." It therefore meets the criteria of a final judgment under Federal Rule of Civil Procedure 54(a).

Next, in paragraphs two and three, the Gonzalez codefendants' motion attempts to discredit the complaint for not stating a claim and for not alleging more than one scheme. The Court finds these arguments questionable in light of the Gonzalez codefendants' consent to the entry of default. Be that as it may, the Court finds that plaintiffs' complaint was sufficient – it stated a claim upon which relief could be and in fact was granted.

The Gonzalez codefendants' motion next alleges that the Court erred in denying Volvo Car Corporation's ("VVC") Motion for Summary Judgment and Motion for a Directed Verdict at the close of its case. Because the Gonzalez codefendants voluntarily consented to default in this case, they admitted each allegation in the plaintiffs' complaint, and waived the right to a jury trial. They forfeited any involvement in the trial with respect to liability. They have no standing to come before the Court now and object to the

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codefendants filed their Motion Under Rule 59 before the Gonzalez codefendants filed their Motion to Vacate, the Court could not address the part to the Trebol's motion adopting the Gonzalez codefendants' arguments. This order therefore addresses Trebol's Motion Under Rule 59, by reference, to the extent that motion adopted the arguments presented by the Gonzalez codefendants' motion now before the Court.

Court's denial of VCC's motions for summary judgment and directed verdict.

The Gonzalez codefendants further adopt VCC's and their own prior motions for a new trial. The present motion contributes no novel arguments or support for those earlier motions. Therefore, the Court reiterates its previous denials of those motions and the arguments upon which they were based.

In paragraph seven, the Gonzalez codefendants allege that "the Court erred both in refusing to dismiss the Monroney claims and in failing to determine, as a matter of law, that the Gonzalez codefendants do not have a statutory duty to disclose pursuant to the Automobile Information Disclosure Act, 15 U.S.C. [§] 1231 et seq.. [sic]. And the Act to Protect Motor Vehicle Buyers in Puerto Rico, 23 L.P.R.A. § 1021 et seq. [sic]." Again, after waiving the right to a trial on liability, the Court finds that the Gonzalez codefendants' arguments cannot be well taken. It would be a travesty of justice of the Court, at this point, to even entertain the arguments presented by the Gonzalez codefendants regarding the Automobile Information Disclosure Act ("AIDA") and the Puerto Rico Act to Protect Motor Vehicle Buyers ("PRAPMV"). Furthermore, the Gonzalez codefendants cite no legal authority for their contentions that plaintiffs' claims under these acts should have been dismissed. The Court therefore denies the Gonzalez codefendants' arguments regarding the AIDA and PRAPMV.

In paragraphs seven, eight, and nine, the Gonzalez codefendants make several allegations of Court error with respect to evidentiary rulings made (or not made) by the Court during trial. The Court will not hear evidentiary objections from the Gonzalez codefendants, who waived their right to a trial and admitted liability.

The Gonzalez codefendants next argue that the Court denied them due process of the law. In particular, they (and the Trebol codefendants by reference) contend that the Court violated its own Bifurcation Order when it heard evidence

pertaining to damages during the liability phase of the trial. This, the argument continues, denied the defaulting codefendants their right to cross-examine witnesses and otherwise be involved in the trial as to damages. In support of their position, the defaulting codefendants have tendered the "unsworn declaration" of Salvador Antonetti, a member of Fiddler, Gonzalez & Rodriguez, the law firm that represented the Trebol codefendants in this matter. In his declaration, Mr. Antonetti describes a conversation that the had with Ms. Courtney Carroll, a lawyer working for the Court as a law clerk during the trial of this case.

The Trebol and Gonzalez codefendants' arguments both misrepresent the procedural history of this case leading up to and during trial and misunderstand the legal ramifications of entry of default, and Mr. Antonetti's statement is of no legal consequence. This Court did not violate the Bifurcation Order, and the defaulting codefendants were in no way denied due process of the law. At all times, the counsel for the defaulting codefendants were aware of the trial's progress and of what evidence was going to come out and in fact did come out during the liability phase. The defaulting codefendants did not attempt to officially appear during the damages phase of the bifurcated trial. Moreover, in order to provide the defaulting codefendants the greatest opportunity within reason to be heard, the Court agreed to hold a hearing solely on the damages to be imposed on those codefendants. At the hearing, those codefendants offered no evidence and made no other efforts to convince the Court that the evidence that was presented during the trial against Volvo was not correct or applicable to them. As a consequence of their voluntary consent to the entry of default, these codefendants had limited rights to be involved in the trying of this case. The Court offered them, at the very least, that process to which they were entitled. These conclusions will be addressed in turn.

First, the Court did not violate the Bifurcation Order. The defaulting codefendants do not clearly explain how or when the Court violated its Bifurcation Order. Instead, they simply conclude that the Court "violat[ed] in mid-trial the

court's order of Bifurcation and provid[ed] no notice to the Gonzalez defendants that liability and damages would be tried together." This is simply incorrect. The cause of action under which the plaintiffs brought their claim is of such a nature that in order to establish liability, they were required to prove substantial injury. The Trebol and Gonzalez codefendants' attorney were well aware of this aspect of the liability phase of the trial. They were present when the Court ordered bifurcation, at which time the necessity of proving damages in order to establish liability was discussed. They could never have reasonably assumed that no evidence on damages would be presented during the liability phase of the trial.

Second, whatever the Court's conduct during the liability phase of the trial, the attorneys for the Trebol and Gonzalez codefendants knew of that conduct and never raised any objections. They were present (albeit in the gallery) at various times throughout the liability phase of the trial and knew how the trial was proceeding. Moreover, one witness, Basilio Velez, who testified during the phase of the trial on behalf of VCC was an executive employee of Trebol. During the trial he was managing the Trebol businesses, because the Gonzalez codefendants were not in Puerto Rico. Now, after a lengthy trial, which included both liability and damages phases, and a hearing on damages against the defaulting codefendants, those defaulting codefendants cannot come before the Court and complain that the Court violated its Bifurcation Order, when they were aware all along how the trial was proceeding and never attempted to raise any resistance.

Third, the defaulting codefendants' reliance on the unsworn statement of Salvador Antonetti, one of Trebol Motors' attorneys, is misplaced. In that declaration, Mr. Antonetti alleges that Courtney Carroll, a law clerk working in this Court's chambers during trial, informed him that the defaulting codefendants' attorneys "were excused." This conversation took place after the Court, as its first order of business, accepted his client's notice of default on this first day of trial, prior to jury selection. Neither the Gonzalez Motion to Vacate nor the Trebol Motion Under Rule 59 (the

motions to which Mr. Antonetti's statement was attached) explain the import they intend the Court to draw inference from obscure submissions. Furthermore, as an initial matter, Mr. Antonetti's statement is too vague to serve as the basis for any implication.[2] It does not explain the context of Ms. Carroll's statement. Nor can we infer from Mr. Antonetti's statement that Ms. Carroll excused counsel from any more than the remainder of the first day of trial. The Court cannot even infer that Ms. Carroll had any idea what Mr. Antonetti was asking to be excused from.

More importantly, even if the Court were to endow from Mr. Antonetti's statement with some inferential import, that statement is of no legal significance. If Mr. Antonetti had wished this non-judicial conversation with the Court's law clerk to carry legal significance regarding his representation of this client in the damages phase of trial, he could have so requested by formal motion or in open court on the record so that his intentions were manifest and indisputable. In that

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[2] Mr. Antonetti's statement reads as follows:

"4. On June 24, 1996, I was present in the courtroom on behalf of the Trebol defendants when this case was called for jury trial on liability, pursuant to the bifurcation order of the Court dated April 16, 1996.

5. As the first order of business that day, the Court read a ruling disposing of certain motions filed By Volvo Car Corporation and accepting the notice of default filed by the Trebol and Gonzalez defendants.

6. After issuing its ruling, the Court declared a recess, the record was closed and the presiding judge, Hon. Jaime Pieras, Jr., Senior U.S. District Court Judge, descended from the bench towards chambers, with other court personnel.

7. At that point, I asked the law clerk assisting the presiding judge, Ms. Courtney Carroll, before she entered chambers, that she inquire of the Court whether the attorneys for the Trebol and Gonzalez defendants could be excused.

8. Ms. Carroll entered chambers and almost immediately returned to the courtroom and responded to my question by stating that the attorneys were excused."

motion or elocution, he would have had to explain the full meaning he ascribed to each statement in the conversation so the plaintiffs and codefendants could take a position and the Court could address a formal order resolving the matter. Because he failed to do so, the Court can not confer any legal consequence on his unsworn declaration. To do so would be tantamount to imbuing something completely outside of the judicial process with indicia of legitimacy. If the Court were to thus stamp Mr. Antonetti's statement with legal imprimatur, there would be no need for courtrooms.

Finally, with respect to Mr. Antonetti's declaration, Ms. Carroll, as a law clerk, cannot bind the Court, and her statements are not those of the Court. See Environmental Defense Fund, Inc. v. Alexander, 614 F.2d 474, 480 (5th Cir. 1980).[3] Any reliance on Ms. Carroll's statements, made in response to a vague question, as a reason to remain absent from trial proceedings would be unreasonable and of no validity. Moreover, Trebol and Gonzalez codefendants did not so rely – they were well aware of what was going on at trial, as discussed above.

Nevertheless, in order to allay any suspicion regarding the events brought into question by Mr. Antonetti's statement, the Court will recount its recollection of those incidents. The

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[3] . . . one of plaintiff's counsel asserts that he spoke to one of the judge's law clerks who told counsel that the judge did not plan to take evidence on any issue but the authorization for the project at the hearing and that all other issues including affirmative defenses would be heard later. We repeat the argument in order to give it express condemnation: courts speak to litigants by orders or minute entries or judgments or, on occasion, at conference in chambers. Ex parte communications with judges are generally disfavored code of Judicial Conduct for United States Judges, Canon 3A(4). A fortiori, neither ex parte communication with a judge's law clerk nor reliance upon such communication can be condoned."

Court told Ms. Carroll that Mr. Antonetti consented to entry of default: what he does after now is his decision, so if he wishes to leave, let him. The Court certainly did not excuse him from attending any phase of the trial. It is common knowledge that in the vast majority of cases, defaulting defendants do not attend a particular phase of the trial amounted to a tactical decision within the province of defense counsels' professional judgment. Furthermore, the law does not impose upon a defaulting defendant the obligation to further attend the trial or a hearing on damages. Consequently, the Court could not "excuse" the defendants from doing that which they were not obligated to do. The allegations concerning Mr. Antonetti's conversation with this Court will not consider them.

Fourth, and perhaps most importantly, the Court reiterates the theme of its October 7, 1996 Opinion and Order addressing the damages to be assessed against the defaulting codefendants, and reminds them that they are just that – defaulting codefendants. As the Court stated at the hearing on damages, when the Trebol and Gonzalez codefendants entered default, the "accepte[d] . . . liability as to the allegations [made in the plaintiffs'] complaint." Tr. Hr'g on Damages, at 4, (August 29, 1996) (citing Goldman, Antonetti Faraiuoli, Axtmayer & Hertell v. Medfit Intern., Inc., 982 F.2d 686, 693 (1st Cir. 1992)). The defaulting codefendants waived their right to a trial and accepted liability. Goldman, Antonetti, 913 F.2d 1406, 1414 (9th Cir. 1990), cert. denied, 111 S. Ct. 1019, 112 L.Ed. 2d 1100 (1991)). Where the Court has a defaulting codefendant and a non-defaulting codefendant in a case of joint liability, it can determine damages against the defaulting codefendant after the liability of the non-defaulting party has been determined. Dundee Cement Co. v. Howard Pipe & Concrete Prod., 722 F.2d 1319, 1324 (7th Cir. 1980)). In making that determination of the amount of damages to assess against defaulting defendants, the Court has considerable latitude. Tr. Hr'g on Damages, at 5 (August 29, 1996); Jones v. Winnespesaukee Realty, 990 F.2d 1, 4 (1st Cir. 1993). As stated in Fed. R. Civ. P. 55(b),

> "[I]f, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States."

"The rule itself establishes that the hearing to be held falls within the discretion of the trial court." Tr. Hr'g on Damages, at 5. In this case, after Volvo's trial, the Court had before it ample evidence from which to determine damages. During a five week trial in which the parties presented more than 21 witnesses and 337 exhibits, the jury was equipped to determine damages. The Court found their determination to be fair, and felt confident in applying the same damages figure to the defaulting codefendants. As stated above, the Court has wide latitude in demarcating and conducting that fact-finding it deems necessary to accurately determine the amount of damages to assess against a defaulting defendant. In some cases this may require a separate hearing; but where a full-blown trial was already held with respect to a non-defaulting codefendant whose interests parallel those of the defaulting codefendants,[4] a Court will often not need a hearing to reliably determine damages. In such cases, the Court does not violate the due process rights of defaulting codefendants by

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[4] During trial, counsel for Volvo competently represented the interests of all codefendants. Particularly with respect to damages. Volvo's goals were identical and never in conflict with the interests of the defaulting codefendants. Volvo presented the same witnesses that the defaulting codefendants would have presented, and counsel for Volvo ably cross-examined all of the plaintiffs' witnesses. Therefore, the concerns of the defaulting codefendants in the determination of damages at trial were adequately protected.

assessing damages using the evidence adduced at trial. However, in order to give the defaulting codefendants every opportunity to protect their rights, the Court did grant a separate hearing on damages pertaining specifically to the Trebol and Gonzalez codefendants. Thus, the defaulting codefendants were given, at the very least, the full measure of process due them.

Fifth, the Court would note that, given an opportunity to exercise some influence on the outcome of this case, the defaulting codefendants refused to meaningfully participate. As discussed above, the Court granted the defaulting codefendants a hearing on damages, at which they were given a chance to present evidence or objections to t he damage award as determined by the jury in the trial against Volvo. At that hearing, the Court declared its intention to apply the jury's damage award to all codefendants, jointly and severally. After the Court declared its intention to apply the jury's damage award to all codefendants, jointly and severally. After the Court declared its intention, counsel for the plaintiffs made their arguments. When the plaintiffs rested, counsel for the Trebol and Gonzalez codefendants were given a turn to state their case. They presented no evidence and did not attempt to discredit any of the evidence that came before the Court during trial. Instead, counsel for the Trebol and Gonzalez codefendants first objected to the use of the trial evidence on due process grounds, maintaining that they were denied the right to cross-examine, and then moved for judgement under Rule 50 of Federal Rules of Civil Procedure. Instead of using the hearing to object on due process grounds, the defaulting codefendants should have accepted the hearing as the process to which they were entitled and with which they were provided, and attempted to make their arguments regarding damages.

This motion, like much of the defendants' post-trial argumentation in this case, has distorted the true character of this case. The reality of the situation can be gleaned from close scrutiny of the facts surrounding the case. The Trebol and Gonzalez codefendants vigorously contested this case for

several years, expending enormous sums of money in the process. Yet, on the eve of trial they informed the Court that they no longer wished to defend, and instead, they consented to entry to default, and allowed VCC to defend alone. Now VCC's case having been unsuccessful, those same codefendants attempt, post-trial, to do what they waived their right to do during trial.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 6th day of December, 1996.

/s/
JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1135
LUIS BONILLA, ET AL.,
Plaintiffs, Appellees,
v.
VOLVO CAR CORPORATION,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO.

[Hon. Jaime Pieras, Jr., Senior U.S. District Judge.]

Before
Selya, Circuit Judge,
Campbell,* Senior Circuit Judge,
And Boudin, Circuit Judge.

COUNSEL: Gael Mahony with whom Michael D. Weisman, Michael D. Vhay, Andres W. Lopez, Anne L. Showalter, Hill & Barlow, P.C., Rafael Perez-Bachs, Nereida Melendez-Rivera and McConnell Valdes were on brief for defendant Volvo Car Corporation.

Daniel L. Goldberg, Alicia L. Downey, Bingham, Dana & Gould LLP, Charles H. Lockwood II, Vice President & General Counsel, Association of International Automobile Manufacturers, Inc., and Phillip D. Brady, Vice President & General Counsel, American Automobile Manufacturers Association, on brief for Association of International

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* Senior Circuit Judge Levin H. Campbell heard oral argument in this matter, but did not participate in the drafting or the issuance of the panel's opinion. The remaining two panelists therefore issue this opinion pursuant to 28 U.S.C. § 46(d).

Automobile Manufacturers, Inc. and American Automobile Manufacturers Association, Amici Curiae.

Allan Kanner with whom Conlee Schell Whiteley, Elizabeth B. Cowen, Allan Kanner & Associates, P.C., Paul H. Hulsey, Frederick J. Jekel, Theodore H. Huge, Ness, Motley, Loadholt, Richardson & Poole, P.A., Jose F. Quetglas Jordan, Eric Quetglas Jordan, Zygmunt Slominski, Quetglas Law Offices, Daniel Harris and Law Offices of Daniel Harris were on brief for plaintiffs Luis Bonilla, et al.

July 28, 1998, Decided

BOUDIN, *Circuit Judge*.

In these seven related appeals, we are asked to examine numerous rulings and decisions in a complex civil suit brought under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 ("RICO"). This opinion addresses the first of the appeals, the principal appeal (No. 97-1135) of Volvo Car Corporation ("Volvo"), and two companion opinions resolve the remaining appeals.[1] We briefly set forth the procedural history of the case as background for all three opinions.

The plaintiffs are a class of individuals and corporations who, between 1983 and 1993, among them purchased 9,077 cars of the 200 series manufactured by Volvo, a Swedish automobile manufacturer. The cars were imported to Puerto Rico by Trebol Motors Distributor Corporation ("Trebol Distributor"), and sold for the most part by Trebol Motors Corporation ("Trebol Motors"). Both of these companies

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[1] The next opinion is directed to the principal appeals of the remaining codefendants (Nos. 97-1140 and 97-1143) and a conditional cross-appeal by the plaintiffs (No. 97-1145). The final opinion deals with sanctions and attorney's fee issues (Nos. 97-1599, 97-1600 and 97-1790).

(together "Trebol") were owned by Jorge Gonzalez and, after his death, by his widow and son, defendants Conchita Navarro de Gonzalez and Ricardo Gonzalez Navarro (together "the Gonzalez defendants").

Plaintiffs have advanced various arguments at different times, but the claims coalesce around one general complaint: that Volvo, Trebol, and the Gonzalez defendants conspired to violate, and did in fact violate, RICO by engaging in hundreds of predicate acts of mail and wire fraud. 18 U.S.C. §§ 1341, 1343, 1962. The plaintiffs allege that the acts were part of a complex and multifaceted scheme to defraud Puerto Rican purchasers by overcharging them for series 200 Volvo cars.

The plaintiffs' first complaint was filed in the district court on June 16, 1992, and named as defendants Volvo, Trebol, and the Gonzalez defendants, and certain other companies no longer parties to the case. The parties spent nearly four years in bitterly waged discovery battles. On April 26, 1996, the district court granted the plaintiffs' motion to file a Third Amended Complaint, which is the operative complaint in the suit. Trial was scheduled to begin before a jury on Monday, June 24, 1996.

On the afternoon of Friday, June 21, 1996--almost literally the eve of trial Trebol and the Gonzalez defendants presented the district court with a joint notice consenting to entry of default "as to the factual averments of the Third Amended Complaint." The district court entered a "final Partial Judgment on the issue of liability" against Trebol and the Gonzalez defendants on July 2.

Trial proceeded with Volvo as the sole defendant. The district court had earlier bifurcated the proceedings, intending that the jury would produce a general liability verdict first and then, if necessary, a verdict regarding damages. Indeed, the district court envisioned two separate damages proceedings, one to determine class-wide damages, and a second (probably involving a special master) to determine the damages of individual class members. However, the presentation of the

evidence was not bifurcated, and the jury heard testimony regarding both liability and damages over twenty days of trial.

On July 25, 1996, the twenty-second day of trial, the jury returned a verdict finding that Volvo was liable for violating and conspiring to violate RICO's prohibition on racketeering activity. 18 U.S.C. § 1962(c), (d). The jury also found that Volvo had used or invested income from a pattern of racketeering activity, id. § 1962(a), but that the plaintiffs had not been injured by this violation.

On July 31, 1996, the district court held a hearing on damages. Neither plaintiffs nor Volvo presented further evidence, but both presented arguments to the jury based on the evidence already submitted. The next day, the jury found Volvo liable for $43,197,100. The district court trebled the amount under 18 U.S.C. § 1964(c), yielding $129,591,300. The plaintiffs then moved for prejudgment interest, attorney's fees, and costs, alleging vexatious discovery conduct by Volvo. Volvo moved for judgment as a matter of law or a new trial.

On August 29, 1996, the court held a hearing on damages as to Trebol and the Gonzalez defendants. On October 10, 1996, the district court issued an opinion and orders denying Volvo's motion for judgment in its favor or new trial and the plaintiffs' motion for prejudgment interest. The court also entered a final judgment as to all defendants (including Trebol and the Gonzalezes) in the full amount of the trebled verdict. Volvo renewed its motion for judgment or new trial, and Trebol and the Gonzalez defendants filed separate motions to set aside the judgment under Fed. R. Civ. P. 59, all of which were eventually denied.

On March 27, 1997, the district court entered two lengthy orders. The first order sanctioned all defendants for vexatious conduct during discovery by declaring that the court would view plaintiffs' submission regarding computation of attorney's fees with indulgence. The second order awarded attorney's fees and costs to the plaintiffs in the amount of $3,518,844.41. Trebol Motors and Trebol Distributor had

filed for bankruptcy under Chapter 11 nearly six months before, on September 30, 1996.

Volvo now appeals the denial of its motion for judgment as a matter of law, for a new trial, or for a remittitur (No. 97-1135), as well as the district court's ruling on sanctions and attorney's fees (No. 97-1599).[2] Trebol and the Gonzalez defendants appeal from the entry of judgment against them (Nos. 97-1140, 97-1143), and the Gonzalez defendants also appeal the sanction and fee award (No. 97-1790). Finally, the plaintiffs have filed a protective appeal asking that, in the event of a remand, this court should require the district court to award them prejudgment interest (No. 97-1145).

In this opinion, we address only Volvo's appeal on the merits; the remaining appeals are dealt with in two separate opinions also issued today. In the instant appeal, Volvo argues that judgment should be entered in its favor because several elements necessary to the plaintiffs' claims were not established by the evidence. Volvo also makes several attacks on procedural and evidentiary rulings, which it claims warrant a remand for a new trial.[3]

Volvo's main contention is that the evidence does not support a finding that Volvo committed predicate acts of mail or wire fraud, a crucial element of plaintiffs' RICO claim. *See*

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[2] The latter rulings are also the subject of a separate appeal by Volvo's attorneys (No. 97-1600) out of a concern that they may be implicated in the sanctions and award of attorney's fees.

[3] Specifically, Volvo claims the district court abused its discretion in certifying the plaintiff class, in sanctioning Volvo's attorneys in the presence of the jury and without notice or a hearing, in admitting certain expert testimony, and in admitting evidence of Volvo's reputation. Volvo also criticizes the district court's charge to the jury. For reasons that will become apparent, we do not reach any of these issues.

Ahmed v. Rosenblatt, 118 F.3d 886, 888 (1st Cir. 1997).[4] We review the district court's denial of Volvo's motion for judgment as a matter of law de novo as to issues of law. We resolve credibility issues and draw inferences in favor of the jury verdict and examine the evidence as a whole. Still, the verdict cannot stand if no reasonable reading of the evidence will support it. *See Schultz v. Rhode Island Hosp. Trust Nat'l Bank, N.A.*, 94 F.3d 721, 731 (1st Cir. 1996).

To prove mail or wire fraud, plaintiffs must show three elements: a "scheme to defraud," Volvo's "knowing and willful participation in the scheme with the intent to defraud," and the use of the mails or interstate wire or radio communication in furtherance of the scheme. *United States v. Cassiere*, 4 F.3d 1006, 1011 (1st Cir. 1993). The conduct must "be intended to deceive another, by means of false or fraudulent pretenses, representations, promises, or other deceptive conduct." *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (1st Cir.), *cert. denied*, 498 U.S. 992 (1990). In addition to demonstrating the fraud, however, RICO requires the plaintiffs to show that they were "injured in [their] business or property by reason of" the fraud. 18 U.S.C. § 1964(c).

The plaintiffs presented the jury with "five frauds" in which they claimed Volvo participated. These are not five isolated acts of fraud, but different groups of activity, each comprising multiple acts; if the activities within the group were fraudulent, any one group would reflect multiple "predicate acts" under RICO. We must determine whether the evidence presented as to at least one of the five frauds is sufficient to support the verdict. We conclude that none of the frauds has been established against Volvo, that the judgment

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[4] 18 U.S.C. § 1962(c) prohibits the conduct of an enterprise's affairs through a "pattern of racketeering activity" and this in turn requires "at least two acts of racketeering activity" within 10 years of each other. 18 U.S.C. § 1961(5). Racketeering activities include mail and wire fraud. *Id.* § 1961(1)(B).

against it must be reversed, and that plaintiffs' claims against Volvo fail in their entirety.

Excise Taxes. First, the plaintiffs claim that Volvo and Trebol together fraudulently underreported material data to the Puerto Rican tax authorities, resulting in reduced excise tax payments on vehicles shipped to Puerto Rico. During the class period, the excise tax on a car imported to Puerto Rico was a function of its horsepower, weight, and FOB (i.e., factory-gate) price from the manufacturer. Volvo certified to Trebol the weight and horsepower of each car shipped to Puerto Rico, and Trebol then disclosed this information to the tax authorities.

Plaintiffs claim that Volvo used a computation formula for horsepower that understated the real horsepower and thus lowered the amount of excise tax due. According to plaintiffs' expert on tax issues, Puerto Rico regulations prior to March 1989 required that horsepower be certified in accordance with standards of the Society of Automotive Engineers. It is common ground that the Society had promulgated two standards of horsepower measurement known as J245 and J1349 and that Puerto Rico's regulations did not specify which method was to be used until March 1989, when the regulations were amended to require the use of J1349.

The undisputed evidence is that Volvo's certifications to Trebol until March 1989 used J245, which yielded a measurement of 107 hp for 200 series vehicles. After the regulations were amended, Volvo began using J1349, which produced a measurement of 114 hp and materially increased the excise tax owed on the vehicles. As far as the record shows, Volvo's certifications disclosed the method used in calculating horsepower and were accurate under the methods used.

Plaintiffs make a similar claim of inaccuracy as to car weight. Plaintiffs' expert admitted that, prior to 1989, Puerto Rico had no regulations defining how a car's "curb weight" was to be calculated. Volvo's certifications specified that certain items were not included in the weighing, such as

fluids, air conditioning, air bags, and other accessories. The weight regulations were amended in 1989 to specify that curb weight included the weight of fuels and lubricants, among other items. There is no evidence that Volvo's certifications thereafter failed to report the higher weights as required under the amended regulations.

Plaintiffs call Volvo's behavior prior to 1989 "excise tax fraud." Their contention is that Volvo knew of the alternative measurement methods for weight and horsepower, but used "false" horsepower and weight figures that enabled Trebol to "evade" payment of over $20 million dollars in excise taxes. According to plaintiffs, it is fraudulent behavior to take advantage of loopholes in the tax laws and a reportedly lax regulatory environment.[5] Plaintiffs cite no authority for the proposition that reducing one's tax burden with methods that are not prohibited by law constitutes tax fraud. We are confident that none can be found.

Plaintiffs attempt to strengthen their argument by demonstrating that Volvo and Trebol knew that other methods of calculating horsepower and weight were available. In particular, they note that the owners' manuals for similar cars sold in the United States and Canada stated horsepower according to the J1349 method well before 1989. This does not establish that Volvo or Trebol had a duty to use J1349 figures in compliance with Puerto Rico's tax laws. Plaintiffs' own expert stated that they did not have such a duty.

A separate issue concerns the disclosure of the FOB price. Plaintiffs proffered several submissions of Trebol Motors to the tax authorities in which the FOB price reported is substantially lower than the invoice price charged by Volvo.

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[5] The plaintiffs' expert, a former director of the Bureau of Excise Taxes at Puerto Rico's Department of the Treasury, stated on cross-examination that tax forms were sometimes processed by government employees unfamiliar with the regulations and that the government relied on automobile importers to report the measurements according to the less favorable standard.

A jury could certainly infer that, absent an explanation, such underreporting-at least if systematic-constituted tax fraud by Trebol. However, no evidence implicates Volvo in false reporting of the FOB price to the Puerto Rican Bureau of Excise Taxes. The plaintiffs' tax expert agreed that the duty to pay the excise tax applies to the Puerto Rican importer, not to Volvo. Another expert agreed that he had seen no evidence that Volvo had participated in tax evasion involving FOB prices.[6]

Plaintiffs place great weight on a single sentence in a single piece of correspondence in 1987 by a Volvo representative to Trebol. The letter concerns a reduction of the length of the factory warranty for 1988 vehicles in light of Trebol's inability to keep warranty claims within Volvo's suggested budget. The letter points out that retaining a three-year warranty would require Volvo to raise the vehicle price by $500, whereas reducing the warranty to one year would enable Volvo to reduce the price by $500. The letter then states: "Also keep in mind that there is a hidden potential profit for you due to reduced excise taxes."

The plaintiffs argue that this sentence refers to Volvo's and Trebol's joint efforts to circumvent excise taxes by underreporting data to Puerto Rican authorities. Although creative, this reading is utterly implausible because the letter, in all other respects, relates to the substantial warranty expenses incurred by Trebol. The quoted sentence can only

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[6] Plaintiffs suggest that Volvo nonetheless facilitated Trebol's understatement of FOB prices by including a price increase as a "separate line item" on invoices at Trebol's request. Plaintiffs argue that the separate surcharge was not included by Trebol in the taxable FOB price reported to the tax authorities. Yet the surcharge was clearly indicated on Volvo's invoices and would have been evident to the tax authorities if disclosed. Trebol did not submit the invoices to the authorities, and it is unclear whether it had a duty to do so. But it is clear that the price Trebol submitted for tax purposes was not controlled by Volvo's itemization of price elements on the invoices.

refer to the fact that a reduction in warranty, by reducing the invoice cost of the car, would by the same token reduce Trebol's excise tax liability, which was calculated partly as a function of invoice cost.

Even if plaintiffs' evidence were sufficient, they have failed to prove that they were injured "by reason of" such activity. 18 U.S.C. § 1964(c). Since excise taxes ordinarily increase the cost to consumers, plaintiffs presumably benefitted from a reduction in taxes. They argue that, by paying lower taxes than competing automobile businesses, Trebol gained an advantage allowing it to dominate the European car market in Puerto Rico and charge higher prices than a truly free market would allow. It is uncertain whether this sequence, even if proved, would involve injury too remote to support recovery under RICO. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-74 (1992).

However this legal issue might be resolved, plaintiffs have pointed to no evidence in the record that other car importers bore higher tax burdens, that these taxes were a reason for a lack of competition among European cars, or that plaintiffs bought Volvos because of a lack of European-car alternatives. We therefore conclude that no rational jury could have found that the supposed "excise tax fraud" comprised acts by Volvo in violation of RICO or caused a recoverable injury to

Port-Added Emblems and Accessories. Plaintiffs' next allegation concerns emblems and accessories. During the class period, 200 series Volvo cars sold in the mainland United States and Puerto Rico had emblems affixed to them that indicated the car model. The vehicles at issue in this case all bore emblems that identified them as 240 DL, 240 GL, or 240 GLE. The middle number "4" in the 240 model series indicates a car with a four-cylinder engine. The underlying 240 series car "platform" is the same in all cases; the evidence at trial showed that the emblems reflect varying levels of accessories. In any given market in any given year, GLEs have more accessories and are more expensive than GLs,

which in turn have more accessories and a higher price than DLs. [7]

The dispute centers on how the emblems and accessories came to be part of the cars as sold to Puerto Rico customers. Between 1985 and 1991, all 200 series cars sent to Puerto Rico arrived from Sweden as 240 DLs with DL emblems. Trebol, with Volvo's permission, equipped some DLs with additional Volvo accessories and new GL or GLE emblems, all of which had been shipped separately from Sweden. The cars were then sold as either GLs or GLEs.[8] This contrasts with Volvo's practice in most other destination markets, where vehicles were imported with accessories and emblems already factory-installed in Sweden.

Some of the accessories installed at the port in San Juan included more ornate tires, metallic paint, leather interiors, voltmeters, tachometers, aluminum wheels, power antennas, and additional radio speakers.

Trebol also marketed a car called a "240 DLWA," which bore a DL emblem but had certain added accessories not included in Trebol's 240 DL. DLWA appears to be an internal designation adopted by Trebol. Although this model type was not reflected on an emblem, it did appear in Trebol's internal price lists and some customer purchase contracts. Thus, even within a single model year, vehicles bearing the same emblem might have different accessories

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[7] Volvo offered undisputed testimony that the emblem designations were not comparable across different markets or years, so that a DL in the United States might have more accessories than a GLE in Sweden in the same year, and a DL in Puerto Rico in one year could have more accessories than the GL of the previous year.

[8] Volvo offered undisputed testimony that the emblem designations were not comparable across different markets or years, so that a DL in the United States might have more accessories than a GLE in Sweden in the same year, and a DL in Puerto Rico in one year could have more accessories than the GL of the previous year.

The plaintiffs claim that Volvo's authorization of port installed accessories and emblem changes gave rise to "fake" Volvo models, permitting Trebol to sell cars that were "in reality" DLs as if they were DLWAs, GLs or GLEs commanding higher prices. Several plaintiffs testified that they felt "cheated" when they discovered that their DLWA, GL or GLE was not "from the factory" but rather was shipped from Sweden as a DL, with accessories added in Puerto Rico. Plaintiffs do not dispute that the cars and all their equipment, including the accessories installed in Puerto Rico, had been manufactured by Volvo in Sweden.

At trial, Volvo's representative offered an arguably plausible business explanation for the practice.[9] However, Volvo apparently conceded that local installation of major accessories was a rare practice in Volvo's other markets and did not occur in the larger continental U.S. market. And doubtless a jury might initially think that there was something suspicious about upgrading the emblem after the car left the factory.

But looked at objectively, the plaintiffs received the cars they ordered- Swedish-made Volvo 240 series car platforms with specified accessories- and this is so whether the Swedish voltmeter and upgraded tires were installed in Sweden or Puerto Rico. The Puerto Rico customers all knew what accessories their respective cars contained. The question, then, is whether Trebol's sale of the car with no affirmative false statement as to where the accessories were installed could be

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[9] A Volvo officer testified that Trebol had asked Volvo to provide cars with more accessories than the 240 DLs and GLs that Volvo had been sending to the mainland United States and Puerto Rico. Volvo's testimony suggested that the carmaker found it inefficient for its production facilities in Sweden to produce a small number of highly-accessorized cars for Puerto Rico and that it was more cost-effective to ship a basic DL to Puerto Rico and allow Trebol to customize more luxurious vehicles as the need arose.

treated as fraud. At the core of the issue is how fraud is to be defined.

Putting aside the scienter element in fraud and looking only at behavior, the locus classicus of fraud is a seller's affirmative false statement or a half truth, i.e., a statement that is literally true but is made misleading by a significant omission. *See Emery v. American Gen. Fin., Inc.*, 71 F.3d 1343, 1348 (7th Cir. 1995) (Posner, C.J.). At common law, fraud doctrine did not impose any broader, general duty to disclose, *see Chiarella v. United States*, 445 U.S. 222, 228 (1980), but it is settled that the mail and wire fraud statutes go somewhat beyond the common law, *see McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (1st Cir. 1990). Thus, a leading commentary on federal jury instructions says that even where there is no falsehood or half truth:

> The failure to disclose information may also constitute a fraudulent representation [under the mail and wire fraud statutes] if the defendant was under a legal, professional or contractual duty to make such a disclosure . . . .

2 Sand, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions, ¶ 44.01, at 44-11 (1997).

There is no basis here for imputing to Volvo or Trebol a "legal, professional or contractual duty" to announce where the emblem and accessories were installed. And Judge Sand's formulation clearly (and correctly) implies that, outside of these categories, there is no general obligation of the seller to tell the buyer everything negative that the buyer might be interested in learning about the transaction or item to be purchased. It is safe to say that few sellers do so- without an explicit regulatory requirement- and caveat emptor remains the general rule (absent false statements or half truths).[10]

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[10] For this reason, an array of statutes and regulations have been enacted to require specified disclosures for certain kinds of transactions. The statute most closely in point, discussed below, is

No doubt a shadowy area exists in which conduct alone, in context, can amount to a misrepresentation. Imagine the sale of a 240 DL where the salesman made no formal representations about the car, although knowing it to have a four-cylinder lawnmower engine in place of a car engine; or, consider a customer who explicitly told the salesman that she was buying the car because it had built-in child safety seats, when the salesman knew that the seats had been removed from that particular car. If such deceptions were deliberate, we assume, at least arguendo, that the sales could be treated as artifices to defraud under the federal statutes.

But nothing inherent in the process of buying a Volvo car amounts to an implicit representation that a Volvo-supplied volt meter or power antenna was necessarily installed by Volvo in Sweden. Many cars today are commonly made entirely in countries other than the home of the manufacturer, and various components are made for, rather than by, the car manufacturer. Nor does it matter that for some other markets Volvo installed more of the accessories in its Swedish factories; whether or not the jury accepted Volvo's explanation for its practice (see note 9 above), nothing obliged Volvo to operate in the same manner in every market.

Curiously, there is not much direct precedent on the question of non-disclosure, and nothing is as helpful as the Sand formulation.[11] It would be a truly revolutionary change

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the Monroney Act which requires specified disclosures by an automobile dealer.

[11] There are a few cases whose general language makes clear that the federal statutes go somewhat beyond common-law fraud, but all of them recognize that there must be some artifice to defraud, in addition to an illicit intent, and, most significantly, almost all of the cases can be explained either by the existence of an independent duty to disclose, *e.g.*, *United States v. Melvin*, 544 F.2d 767, 774 (5th Cir. 1977), or by the use of deceptive half truths, *Emery*, 71 F.3d at 1347; *United States v. Townley*, 665 F.2d 579, 585 (5th Cir. 1982).

to make a criminal out of every salesman (assuming use of the mails or telephone) who did not take the initiative to reveal negative information about the product and who- a jury might find- harbored in his heart the hope that the buyer would never ask. Whether or not this would bring business in the United States to a standstill might be debated; but it is a change, if it is ever to be made, that should be undertaken by legislatures and not by courts. *Cf. McEvoy Travel*, 904 F.2d at 791-91.

The plaintiffs say that the accessories added in Puerto Rico disproportionately increased the sale price of the vehicles. They claim (for example) that the difference in cost to Trebol between a 1987 DLWA and a 1987 DL was $155, but the difference in purchase price to the customer was $3100; in other words, Trebol marked up the accessories enormously. Plaintiffs also say that the GLE label itself effectively represented a $2000 increase in price. Certain plaintiffs testified that they would not have paid these surcharges had they known that the added accessories were so minor.

However, the plaintiffs have not shown that the vehicle price or the nature of the car's luxuries were unknown to them. No plaintiffs testified that they believed the GLE and GL were different from the DL in any way other than accessories and emblems; generally, plaintiffs signed a "Pre-Delivery Inspection Report" upon delivery of the vehicles acknowledging the accessories installed in the car. Plaintiffs' statements in retrospect that they would rather not have paid their bargained-for price for accessories they knew they were getting are not proof of fraud.[12]

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[12] We note the similarity of the entire claim discussed in this section to an earlier claim brought by a single Volvo purchaser in Puerto Rico. This claim was dismissed by the district court, and the dismissal was in turn affirmed in an unpublished decision of this court, *Rodriguez-O'Ferral v. Trebol Motors Corp.*, 998 F.2d 1001, 1993 WL 261993 (1st Cir. 1993) (table). Although the parties make reference to our earlier affirmance, we do not rely on that decision as precedent because it was unpublished.

Prices. The plaintiffs' third claim is denominated as one of "price fraud." This claim consumed much of the trial with expert testimony as to whether Volvo cars sold by dealers in the mainland United States carried substantially lower prices than equivalently equipped cars sold by Trebol in Puerto Rico. There was also documentary evidence tending to show or negate Volvo's awareness of the retail prices of cars in Puerto Rico.

Assuming that Volvo was aware that Trebol's retail prices exceeded those of comparably equipped Volvo cars on the mainland, such a price disparity is not itself fraud. An excessive price can be the result of fraud, the defrauded buyer generally paying a higher price than he would have paid absent a deception. But there is nothing in the law of fraud that prevents even a single seller from charging different markups in different markets so long as there is no affirmative misrepresentation.

However, plaintiffs' claim does not rest solely on the premise that Trebol's prices were higher than mainland prices. First, the plaintiffs assert that Volvo and Trebol interfered with the ability of Volvo dealers in the United States to sell cars at lower prices in Puerto Rico, and that as a result Trebol was able to keep charging excessive prices.[13] Second, plaintiffs argued that Trebol, with Volvo's permission, discouraged buyers from purchasing vehicles in the continental United States and importing them to Puerto Rico

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[13] Specifically, a Volvo dealer from Miami offered to fly Puerto Rican purchasers to Miami for a weekend and pay for accommodations if they bought a Volvo. Trebol requested that Volvo "take action" on the matter. Although Volvo did maintain a policy of discouraging its importers from interfering in each other's markets, a Volvo representative stated that there was little that Volvo or an importer could do to prevent an independent dealer from selling outside its territory. Plaintiffs have not shown that Volvo's actions on the "gray market" issue went beyond informing the Miami dealer of its disapproval.

by refusing to honor the imported vehicle's warranty for more than one year.[14]

Putting aside Volvo's own responsibility for Trebol's pricing, large markups and differential pricing may seem unfair to consumers and may well have appeared reprehensible to the jury. And actions taken by Volvo or Trebol or both to reinforce this market segmentation and to discourage intra-brand competition by other mainland-based Volvo dealers may have looked even worse. Indeed, some kinds of constraints on intra-brand competition are vulnerable under the antitrust laws. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957).

The ability to charge excessive markups and engage in differential pricing is almost everywhere the symptom of lack of competition or other market failure (e.g., inadequate information). Such behavior flourishes in markets that are small and are geographically or otherwise isolated. For products like automobiles, customers tend to shop where they can also get service and one expects less competition and higher markups in thinner markets (where costs may also be higher). Whether price discrimination helps or hurts consumers, and it can do either, VIII Areeda, Antitrust Law ¶ 1616f, at 226 (1989), it is not itself fraud.

We have no reason to consider whether the antitrust laws would reach Volvo's discouragement of Florida dealers from marketing their cars in Puerto Rico or Volvo's use of warranty

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[14] Plaintiff Canino purchased a DL in New York and paid shipping and excise to Puerto Rico, and the resulting price was still $4000 lower than what she would have paid for an identical DL from Trebol Motors. However, Trebol would only honor the vehicle's warranty for one year rather than three because the vehicle was purchased outside Puerto Rico. When Canino asked Volvo to explain this, Volvo replied that it could not interfere with Trebol's warranty policies.

policies to dissuade customers from buying their cars elsewhere and bringing them to Puerto Rico. Antitrust violations were not charged in this case, and in any event do not constitute predicate acts under *RICO*. 18 U.S.C. § 1961(1). This is also not the rare case where an antitrust violation also involves a sufficient measure of deception to qualify as fraud (e.g., secret bid-rigging cases).

Double Invoicing. The most factually complex claim against Volvo arises from a double invoicing scheme involving a Liechtenstein-based corporation named Auto und Motoren Aktiengesellschaft ("AUM"). Trebol, Volvo, and AUM maintained what was, according to Volvo, a relationship whereby AUM guaranteed Trebol's debts to Volvo. Volvo would send Trebol an invoice with every shipment of vehicles and copy that invoice to AUM to keep it informed of its potential liability.

Plaintiffs showed that, between 1986 and 1989, AUM sent Trebol additional invoices for the same vehicles but with different purported prices. AUM's invoices sometimes overstated the vehicles' cost relative to the actual price in the authentic Volvo invoice by as much as $3000; not all AUM invoices contained inflated prices and some of the inflated ones involved small amounts (e.g., $50). In any case, Trebol used these inflated invoices to obtain higher inventory financing from Puerto Rican banks and Trebol also calculated its retail prices using the inflated cost as a starting point. Trebol also remitted the higher invoice amount to AUM, resulting in the accumulation of a pool of excess funds in Liechtenstein. Plaintiffs' evidence suggested that some of these funds were funnelled back to Trebol.

Since Trebol was sent copies of the original Volvo-prepared invoices, a rational jury could conclude that Trebol knew of the actual prices and was defrauding Puerto Rican banks by means of the double invoicing scheme. If Trebol used the inflated invoice prices on its tax returns, tax authorities may also have been defrauded. Far more tenuous is the conclusion that Volvo knowingly participated in the

fraud. After reviewing the evidence presented, we do not believe that any rational jury could conclude that it was more likely than not that Volvo knowingly participated in the AUM fraud.

Plaintiffs say that an inference of such knowledge could be inferred because Volvo's relationship with AUM was unusual and not adequately explained. Plaintiffs point out that Volvo importers in other markets usually did not invoice through a foreign guarantor. Plaintiffs' expert testified that AUM served no legitimate business purpose: he said that it seemed to serve simply as a conduit for Trebol's payments and despite the "guarantor" label, in early 1993, Volvo executed a "Loan Agreement" whereby Volvo loaned AUM 2.7 million dollars to cover Trebol's debts--a transaction that appears exactly contrary to a guarantor's role. Volvo later authorized a transaction in which AUM swapped Trebol's debt to it for equity in Trebol.

The use of a "guarantor" for Puerto Rico but not for the continental United States is less mysterious than might otherwise be supposed. The evidence showed that, in the continental United States, Volvo's importer was a wholly owned subsidiary of Volvo and the use of a guarantor would have been superfluous. In Puerto Rico, Volvo was entrusting valuable inventory to an importer controlled by the dealer and in a location where Volvo had no permanent presence.

Why Volvo would have lent money to a guarantor on one occasion was not as well explained; Volvo's representative described the transaction as involving no real loan of money but as an "extended credit term" to give Trebol an extension on its payments for cars shipped by Volvo. One might have expected Volvo, in conducting a prudent defense, to have shed more light on its connections with AUM, assuming that they were wholly innocent. But the burden was not on Volvo to negate charges of fraud, and the trial judge mistakenly

hindered efforts by Volvo to provide some explanation or negate the inference.[15]

In all events, on the evidence of record, it would be pure speculation for a jury to conclude that Volvo had any knowledge of the double invoice scheme. Self-interest gave Trebol reason to participate in such a fraud, but there was little reason for Volvo to do so absent proof--and proof was absent--that Volvo got more than its original invoice price. The jury had no basis for concluding that Volvo received more money from AUM than was charged in the original invoices.[16]

Plaintiffs rely on *United States v. London*, 66 F.3d 1227, 1243 (1st Cir. 1995), in which we held that "evidence of mutual interest" between a money launderer and his clients supported an inference that the launderer "intended to promote" his client's illegal activities. However, the inference in London was permissible only because "evidence of mutual interest" was coupled with "knowledge that the property involved . . . represented the proceeds of some form of unlawful activity." *Id.* at 1242 (quoting 18 U.S.C. § 1956(a)(1)(A)(i)); *see also United States v. Ortiz*, 966 F.2d 707, 713-14 (1st Cir. 1992), *cert. denied*, 506 U.S. 1063

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[15] During Volvo's cross-examination of one of the plaintiffs' experts, the district judge sanctioned Volvo's counsel for misconduct during discovery, particularly regarding Volvo's delay in filing copies of the invoices that Volvo had issued to Trebol and AUM. The sanction was that Volvo "cannot bring any evidence pertaining to the double invoicing sent by Volvo to the Liechtenstein corporation." The district court eventually withdrew its sanction order, but it denied Volvo's request to recall witnesses whose cross-examination had been limited pursuant to the order.

[16] After a heated dispute, the district court ruled that Volvo had produced for plaintiffs its records of AUM payments to Volvo. It is not clear that plaintiffs ever offered the records in evidence and, in any event, plaintiffs point to no evidence that Volvo did receive excessive payments.

(1993). Plaintiffs have not shown analogous knowledge on Volvo's side that Trebol was engaging in fraudulent activity.

Disclosure Labels. The last of the "five frauds" involves misrepresentations of information on disclosure labels required by law. During most of the class period, a Puerto Rican statute, popularly known as "Law 77," mandated that the "seller or dealer" of motor vehicles conspicuously affix to each vehicle for sale a label disclosing, inter alia, the name and address of the selling entity, the factory cost of the vehicle, the tax "on the vehicle and equipment installed in Puerto Rico," and the "retail price in Puerto Rico suggested by the seller." P.R. Laws Ann. tit. 23, § 1023 (1987), repealed by 1992 P.R. Laws Act 80.[17]

Plaintiffs introduced several automobile disclosure labels showing "cost" figures that were based on the inflated figures sent by AUM. Because the information actually provided in Trebol's labels is critical to this claim of fraud, we have reproduced an example of such a label in the appendix to this opinion, omitting specific cost numbers. Although Trebol's labels did not precisely follow the requirements of Law 77, it is clear that they were intended to be Law 77 labels.

Trebol appears to have begun with AUM's inflated CIF ("cost, insurance, freight") figure and added more items -- occasionally itemized by Trebol in the margin of AUM invoices as "royalties," "accessories," "publicity," and "other costs" -- to produce a base "cost" figure that was reported on the Law 77 label. Trebol's Law 77 label then added excise taxes, license plate fees, compulsory insurance and "other costs" to produce a "total vehicle cost." The label also stated a "suggested sales price" which was somewhat higher (e.g.,

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[17] In 1992, Puerto Rico enacted a new statute requiring the "importer or distributor" to affix a label to all vehicles displaying "the information the Secretary [of the Treasury] deems necessary" and the "suggested consumer sales price." 1992 P.R. Laws Act 80, § 2.

$1,500) than the "total vehicle cost"; actual purchase prices generally fell between the total vehicle cost figure and the suggested sales price.

To the extent that the AUM invoices gave inflated CIF cost figures (and not all did), the Law 77 labels that copied those figures misrepresented what Law 77 intended to be the factory "cost" of the vehicles to Trebol. The jury could easily infer that this misrepresentation injured some of the plaintiffs; in bargaining with Trebol, customers probably believed that the dealer had to charge at least the reported "total vehicle cost." Deliberately overstating this figure would be fraud, and we need not look far to find a use of the mails in connection with the scheme, namely, Trebol's correspondence with AUM which furnished the inflated CIF figures.

However, plaintiffs do not dispute that the label provision of Law 77 imposes the disclosure obligation only upon sellers or dealers, which are clearly distinguished from "manufacturers" in the statute. *See* P.R. Laws Ann. tit. 23, §§ 1022, 1023. There is no evidence, nor is there a basis to infer, that Volvo had any role in the preparation or display of the labels. Indeed, as already explained, there is no evidence that Volvo ever knew that AUM was furnishing false figures to Trebol, which Trebol then used in the Law 77 labels.

Alternatively, plaintiffs argue that Volvo must at least have been aware that false labels were being affixed. Its representatives, they say, visited Trebol for quarterly meetings to discuss marketing and sales. At least one Volvo witness said he was familiar with Trebol's prices to customers, although he did not say that he learned this information from looking at the labels. Volvo was also entitled under its importer agreement to direct reports from Trebol as to prices and sales.

We will assume arguendo (and seemingly without any direct evidence) that Volvo representatives saw the Law 77

labels, that they read Spanish,[18] and that they took note not only of the suggested sales price on the labels but the underlying cost figures as well. As already noted, Law 77 requires a statement of the "factory cost of the vehicle." If the labels had been phrased in this way, perhaps they would have been alerted to a discrepancy between the ordinary factory price of an unequipped DL and the higher figure on the label derived from the false AUM invoices.

But the actual labels did not refer to "factory cost" at all, although Law 77 intended that this figure be furnished; instead, the base figure stated on the label is identified as "costo (incluye flete y seguro)," i.e., cost including shipping and insurance. There is no indication on the label whether the cost purports to be that of the manufacturer or of the importer--remember, here the "seller" is third in the chain--or whether it includes the accessories shipped separately from Sweden, or whether a potentially significant importer markup is included anywhere in the cost figure.

To infer from this that Volvo knew that Trebol was using false Law 77 labels is a leap that cannot rationally be made. Plaintiffs do not offer any persuasive explanation as to precisely how the Law 77 labels must have revealed fraud to Volvo. Nor do provisions of Volvo's standard importer agreement granting Volvo the right to request reports on Trebol's sales and financial situation suffice; not only is it unclear what information Volvo received, but there is no showing that Trebol's sales prices and balance sheets would have revealed the "cost" misrepresentations on Law 77 labels.[19]

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[18] Most Volvo representatives who visited Puerto Rico were Swedish, and the evidence shows that they generally conducted business with Trebol in English.

[19] We need not reach the interesting question whether--if Volvo did know of the fraud--the facts would allow a jury to hold Volvo liable under RICO for Trebol's deceptions simply because Volvo continued to supply cars to Trebol. *Cf. Direct Sales Co. v.*

Turning from Trebol's disclosure obligations to those of Volvo, plaintiffs argued Volvo itself was obliged to ensure that the cars bore a different label, required under the Automobile Information Disclosure Act (commonly called the "Monroney Act"), 15 U.S.C. §§ 1231-33. This statute requires that every "manufacturer of new automobiles distributed in commerce" in the United States, including Puerto Rico, have a label affixed to the windshield or side window prior to delivery to the dealer, specifying information akin to, but different in some respects from, the disclosure required under Law 77.

The statute defines "manufacturer" as "any person engaged in the manufacturing or assembling of new automobiles, including any person importing new automobiles for resale." 15 U.S.C. § 1231(a). Volvo asks us to read the Monroney Act as if the duty to install the label on imported cars falls on the importer rather than upon the foreign manufacturer. This suggestion has some force--merely as a matter of language--because the label requirement is directed to the affixing of the label "prior to the delivery of any new automobile to any dealer," id. § 1232, which is the task usually performed by the importer in the case of a foreign car.

Volvo's interpretation is also supported by some legislative history which speaks of disclosure by the manufacturer "or" importer, *see* H.R. Rep. No. 85-1958 (1958), reprinted in 1958 U.S.C.C.A.N. 2902, 2903, 2906, and by the fact that certain of the information required in the label would be known to the importer but not necessarily to the manufacturer, *see, e.g.*, 15 U.S.C. § 1232(c) (name and address of each dealer). Two trade associations have filed an amicus brief asserting that the uniform practice in the case of foreign car imports is for the importer rather than the manufacturer to affix the label.

United States, 319 U.S. 703, 709-13 (1943); *Aetna Cas. & Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1562 (1st Cir. 1994).

We were unable to locate any decided case on this issue and need not resolve it here. As plaintiffs themselves assert, Volvo was not sued under the Monroney Act, and the Monroney Act is not one of the statutes whose violation comprises a predicate act under *RICO*. 18 U.S.C. § 1961(1). Even if the Monroney Act did apply to Volvo, plaintiffs' fraud claim on this theory would fail for lack of proof of scienter: as already noted, the offense of fraud requires both a deceptive act and knowledge that the act is deceptive. *Cassiere*, 4 F.3d at 1011.

A mail or wire fraud conviction usually cannot result from a failure to disclose unless the defendant was aware of its duty to disclose. *See, e.g.*, *Cassiere*, 4 F.3d at 1022; Sand, *supra*, ¶ 44.01, at 44-11, 44-16. If Volvo knew it was required to disclose information under the Monroney Act and failed to do so, such a deliberate violation could constitute an act of fraud. *See, e.g.*, *United States v. Melvin*, 544 F.2d 767, 774 (5th Cir. 1977). However, if the disclosure was omitted in good faith, there was no fraud. *United States v. Dockray*, 943 F.2d 152, 155 (1st Cir. 1991) (holding that good faith is an "absolute defense" to mail and wire fraud); *United States v. Ashman*, 979 F.2d 469, 480 (7th Cir. 1992) (same).

Volvo's duties under the Monroney Act are far from clear, and plaintiffs offered no evidence that Volvo knew it had a duty to affix labels to cars sold by Trebol. Volvo's practice on the mainland was to let its own importing company attach the labels, there was no showing that foreign manufacturers ordinarily affixed such labels, and there is no indication that any foreign manufacturer has ever been held liable for failing to affix a label. Under these circumstances, an inference of deliberate deception by Volvo would be impossible to sustain even if we agreed that Volvo had such a legal duty under the Monroney Act--a point on which we are at the very least doubtful.

To conclude, it is only with great reluctance that an appeals court rejects a jury verdict for lack of evidence to support it. But save for acquittals in criminal cases, the right

to jury trial under our Constitution does not mean that the jury automatically gets the last word: a jury decision is final only where a jury, operating within the framework of the governing legal rules, could rationally decide the case in the manner it did. And the error may not be the jury's fault at all.

In this case, we do not know whether the jury was misled by jury instructions whose validity we have not had to consider, or whether it wrongly attributed Trebol's fraud to Volvo or found offensive the higher markups charged in Puerto Rico, or whether the explanation lies somewhere else. It is enough here that the evidence was not sufficient, under a proper reading of the law, to impose liability on Volvo. Volvo is entitled to judgment as a matter of law on the merits of the complaint.

The district court's judgment entered on October 10, 1996, is reversed as to Volvo.

It is so ordered.

APPENDIX

TREBOL MOTORS

DECLARACION DE INFORMACION AL CONSUMIDOR
DE ACUERDO A LOS REQUISITOS DE LA LEY
NUMERO 77 APROPADEA EL 31 DE MAYO DE 1972

1.NOMBRE DEL VENDEDOR DIRECCION DEL LOCAL

_____ _____

DIRECCION POSTAL

_____

2.NOMBRE DEL IMPORTADOR DIRECCION DEL LOCAL

TREBOL MOTORS CORP. PO BOX 11204 FDZ JUNCOS
SANTURCE, PR 00910

3.FECHA INTRODUCCION MARCA NUMERO DECLARACION

10/11/87 VOLVO 88041

MODELO AND NUMERO DE MOTOR

4DLWA 1988 YV1AX8845J1 285905

4. PRECIO DE VENTA SUGERIDO ****

5. PRECIO CONTRIBUTIVO ****

6. COSTO (INCLUYE FLETE Y SEGURO ****

IMPUESTOS (ARBITRIOS ****

DERECHOS DE REGISTRO (TABILLAS) ****

SEGURO COMPULSORIO (ACAA) ****

OTROS COSTOS ****

TOTAL COSTO VEHICULO ****

STOCK: 4DLWA3090

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1140

Luis BONILLA, ET AL.,
Plaintiffs-Appellees,
v.
TREBOL MOTORS CORPORATION, ET AL.,
Defendants-Appellees.

Richardo Gonzalez-Navarro and Conchita Navarro De Gonzalez,
Defendants-Appellants.

No. 97-1143

Luis BONILLA, ET AL.,
Plaintiffs-Appellees,
v.
TREBOL MOTORS CORPORATION, ET AL.,
Defendants-Appellants.

No. 97-1145

LUIS BONILLA, ET AL.,
Plaintiffs-Appellants,
v.
TREBOL MOTORS CORPORATION, ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO.
[Hon. Jaime Pieras, Jr., Senior U.S. District Judge.]

Before
Selya, Circuit Judge,
Campbell,* Senior Circuit Judge,
And Boudin, Circuit Judge.

July 28, 1998, Decided

BOUDIN, *Circuit Judge*.

This opinion, the second in a series of three, is a companion to our decision in *Bonilla v. Volvo Car Corporation*, 150 F.3d 62, decided this day ("*Volvo*"). That decision sets forth a description of the litigation, including the allegations made by the plaintiffs, the course of proceedings, and the disposition of claims in the district court. This opinion is directed to the merits appeal of the defendants other than Volvo, specifically Trebol and the Gonzalez defendants, and the cross-appeal by the plaintiffs. We assume the reader's familiarity with the Volvo opinion.

In the district court, Trebol and the Gonzalez defendants litigated actively through discovery and summary judgment proceedings during the four years between the filing of the complaint and the trial. But, as recounted in Volvo, three days before the trial scheduled for June 24, 1996, Trebol and the Gonzalez defendants consented to the entry of default against them "as to the factual averments of the Third Amended Complaint." After the liability verdict and the subsequent damage verdict against Volvo, Trebol and the Gonzalez defendants resumed their participation in the case.

Whether and to what extent Trebol and the Gonzalez defendants may have monitored the Volvo trial is unclear, but

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* Senior Circuit Judge Levin H. Campbell heard oral argument in this matter, but did not participate in the drafting or the issuance of the panel's opinion. The remaining two panelists therefore issue this opinion pursuant to 28 U.S.C. § 46(d).

they were not invited to participate in the damage phase of the Volvo trial; that phase was itself abbreviated because--despite the original bifurcation order--the plaintiffs and Volvo relied entirely on liability-phase evidence and simply presented arguments to the jury. The jury then assessed damages only against Volvo and not against Trebol or the Gonzalez defendants.

The damage verdict against Volvo was delivered by the jury on August 1, 1996. On August 19, the plaintiffs filed a motion to assess damages against Trebol and the Gonzalez defendants. The next day, August 20, these defendants were given telephone notice that a hearing on the matter was scheduled for August 29, nine days hence. The Gonzalez defendants immediately filed a motion (on August 20) requesting a postponement of the hearing, pointing to the very short notice and the fact that counsel would be out of the country taking depositions in Finland and Spain during the two weeks surrounding the proposed hearing. Counsel suggested September 26 and 27 as convenient dates for the hearing.

So far as the record reveals, the court denied this motion for continuance on August 21, but this order was not entered until August 27. That day, the Gonzalez defendants filed a joint motion requesting a pretrial conference "prior to the hearing scheduled for August 29 . . . to discuss the parameter [*sic*] of the hearing and to discuss the applicability of a jury." Similarly, on August 27, the Trebol defendants filed their own motion for a continuance. Neither motion was acted upon prior to August 29, when the parties appeared for the hearing, and the district judge then denied both motions. His rationale, set forth in the order entered August 27 denying a continuance, was this: "If Trebol and Gonzalez codefendants were prepared to go to trial on June 24, 1996, they should be prepared for a Hearing on the issue of damages more than two months later."

At the August 29 hearing, plaintiffs again relied upon the evidence presented against Volvo, urging that the defaulting

defendants had abandoned any right to contest that evidence by failing to appear for the damages phase at the trial. The defaulting defendants offered to present evidence that the district court had excused them from attending the liability trial against Volvo after the default, pointed to the original order for a bifurcated trial on damages and asserted that they were entitled to a jury trial on damages against them. They also complained that the plaintiffs were relying for damage evidence on witnesses from the Volvo liability trial whom the defaulting defendants had never had occasion to cross-examine.

What is most important to these appeals is that the defaulting defendants also renewed their request for an effective opportunity to oppose plaintiffs' damage claim. That damage claim, as we explain below, depended primarily on plaintiffs' contention that the lower retail prices of Volvo cars in sales on the U.S. mainland reflected the "real" value of the cars in Puerto Rico. The defaulting defendants made a specific offer of proof that, if allowed to collect and present evidence, they would show that this price disparity was a common occurrence for luxury car sales and did not prove the value of the same cars in the Puerto Rico market. The court scheduled no further hearing but took the case under submission.

In an opinion and order dated October 7 but entered October 10, 1996, the district judge determined that Trebol and the Gonzalez defendants were liable for the same damages assessed against Volvo by the jury. The court said briefly that the complaint had charged a conspiracy among all of the defendants and since the four remaining defendants had defaulted on the complaint, they were liable for all damages assessed against Volvo on the ground that a conspirator is responsible for offenses committed by his fellow conspirators. On October 10, the district court entered judgment against Trebol and the Gonzalez defendants in the same amount as that previously entered against Volvo, namely, $129,591,300.

The defaulting defendants' arguments in these appeals fall into three categories. First, despite their default, they

challenge the adequacy of the allegations in the complaint to set forth a cause of action. Second, they claim that they were entitled to a jury trial on damages and that they were improperly denied an opportunity to present evidence at the damages hearing on August 29, 1996.[1] Third, Trebol (but not the Gonzalezes) say that the proceedings against them should have been stayed because the two Trebol corporate defendants filed for bankruptcy (on September 30, 1996) before judgment was entered (on October 10, 1996).

The default judgment and the adequacy of the complaint. Generally speaking, a default judgment bars the defaulting party from disputing the facts alleged in the complaint, but it preserves for appeal arguments of law made below as to whether the facts as alleged state a claim. 10 Moore's Federal Practice, § 55.12[1], at 55-18 to 55-19 (Coquillette et al. eds., 3d ed. 1997); *see also McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 229-30 (1st Cir. 1980); *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988), *cert. denied*, 493 U.S. 858, 107 L. Ed. 2d 124, 110 S. Ct. 168 (1989).

In this case, prior to their default in the district court, the defaulting defendants presented a barrage of legal attacks on the complaint in conjunction with motions for summary judgment, and the district court generally rejected these challenges in denying the summary judgment motions.[2]

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[1] This latter claim was preserved in the district court, but has only been presented in inchoate form on appeal as an adjunct to the jury trial argument. Although we could treat the argument as waived, we decline to do so because of our concern that the lack of time to prepare for the presentation of evidence together with the damages theory applied, explained below, quite possibly resulted in a serious miscarriage of justice.

[2] Whether or not a denial of summary judgment is independently reviewable after a final judgment is entered, *see* 10A Wright, Miller & Kane, Federal Practice and Procedure § 2715, at 266 n.26 (1998) (collecting conflicting cases), defendants' purely

Although the summary judgment motions were directed to the Second Amended Complaint, the Third Amended Complaint on which the case went to trial was not different in any respect material here. The complaint set forth two different claims of fraud against Trebol and the Gonzalezes.

The first, rather tersely stated, was that the defendants had modified or altered 240 DL models by providing some new accessories and upgraded emblems and then sold these "disguised" vehicles "as if they were factory made models" and for much more than the price that the defendants "would have normally charged for the 240 DL Volvo models with such alterations or modifications." The second claim was that the defendants had a statutory duty under both federal and Puerto Rico law to disclose on a label a range of material facts that they omitted and failed to disclose, including the cars' manufacture as DL (rather than GL or GLE) models, the manufacturer's suggested retail price, the suggested retail price for optional equipment, and the factory cost of the 240 DL models.[3] In the district court, Trebol and the Gonzalez defendants made numerous legal attacks on the adequacy of the complaint, but on this appeal they have confined themselves to three: first, that the emblem altering practice and addition of port accessories did not constitute a scheme to defraud and that there was no duty to disclose that final emblems and certain accessories had been added in Puerto Rico. Next, they argue that fraud was not alleged with sufficient particularity in the complaint as required by Fed. R. Civ. P. 9(b). Finally, the Gonzalez defendants argue that there

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legal challenges to the complaint were adequately raised in the district court.

[3] There is some question how far these two claims fully encompass the five different frauds on which the defendants offered evidence in the liability trial against Volvo. It appears that during discovery the plaintiffs expanded the number of frauds and justified their proof, after the district court denied a further full-scale amendment of the complaint, in order to show a pattern of conduct.

is no explicit allegation that they (as opposed to Trebol) made false representations to customers.

The latter two objections need not detain us long. Arguably, the complaint did not describe the frauds with sufficient particularity insofar as it did not identify any individual instance in which an individual car was sold with a false emblem and accessories added in Puerto Rico nor identify any individual automobile label with specific deficiencies. *See Beringer*, 633 F.2d at 228. Similarly, the complaint did not point out the alleged connection between the individual Gonzalez defendants and any specific act of wrongdoing, making only general assertions that the Gonzalezes held important ownership, executive, and employee positions in Trebol.

However, plaintiffs' opposition to the motion for summary judgment and related discovery material cited gave sufficient notice of the fraudulent acts alleged and of the basis for associating the Gonzalezes with their alleged commission. A remand at this stage to allow an amendment to the complaint to restate this information would be silly. We therefore follow those courts that, in special circumstances and only for Rule 9(b) purposes, have treated the plaintiffs' opposition to summary judgment--of which the defaulting defendants had notice--as a de facto amendment or supplement to the complaint's allegations. *E.g.*, *Elias Bros. Restaurants, Inc. v. Acorn Enters., Inc.*, 831 F. Supp. 920, 922 n.3 (D. Mass. 1993); *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1524 n.5 (S.D.N.Y. 1983).

Once past the Rule 9(b) objection, there is no doubt that the complaint states at least one valid cause of action under RICO on a fraud theory. Trebol had clear-cut obligations to supply label information under Law 77 and, so far as appears, under the Monroney Act as well. The complaint, as supplemented by the opposition, charges a failure to include full and truthful information; it implicates the Gonzalez defendants; and it asserts use of the mails and injury to plaintiffs. While this is enough to defeat dismissal, the

adequacy of the emblem and port accessory claim deserves independent attention because damages could be affected by the content of the fraud claim or claims that are upheld.

The claim is really two claims in one. In presenting the claim, the complaint at least suggests that the defendants had an obligation--in order to avoid fraud--to tell customers that the emblems and accessories had been added in Puerto Rico rather than in the Volvo factory. This reading of the claim was fully developed by plaintiffs in opposing summary judgment and was pursued against Volvo at trial. For reasons set forth in our Volvo opinion, slip op., pp. 13-19, we do not think that this version of the claim sets forth a valid cause of action for fraud. Our reasons apply equally to the defaulting defendants whose attack on the complaint in the district court adequately preserved the issue for appeal.

However, the same language in the complaint even more clearly sets forth a different theory of fraud, namely, that as a factual matter there is such a thing as a "real" GL or GLE and that the cars actually sold by Trebol in Puerto Rico were "in reality" simply DLs fraudulently disguised as the higher priced GLs and GLEs. We now know from the Volvo liability trial that there was no such disguise: GLs and GLEs, whether sold in Puerto Rico or elsewhere, were always DLs with different emblems and a bundle of added accessories that varied from one market to the other. Indeed, the plaintiffs during the litigation appear to have revised, and added to, their fraud claims as this disguise argument proved to be baseless.

The problem for the defaulting defendants, however, is that the defect in this version of the claim is not one of theory but of fact. And having defaulted at the liability trial, these defendants are not automatically in a position to benefit from the facts that it yielded. Since we conclude below that a further proceeding must be held as to damages, the question remains whether plaintiffs can proceed to collect damages on a legally sound but factually erroneous cause of action. This issue is easier to address after addressing the damages issue

and explaining the need for a remand--the issues to which we now turn.

Jury Trial and the Opportunity to Present Damage Evidence. Having established that the complaint set forth two independently sufficient claims (although one of them based on a false factual premise), we consider Trebol's argument that it was entitled to a jury trial on damages or at least an opportunity to present evidence relative to damages. The ordinary rule is that a defaulting defendant is entitled to contest damages and to participate in a hearing on damages, should one be held. 10A Wright, Miller & Kane, Federal Practice and Procedure § 2688, at 67-68 (3d ed. 1998). But a defaulting defendant is not entitled to a jury trial on damages, although the court may choose to afford one. Id. at 69.[4]

It was open to the defaulting defendants to appear at the liability trial, concede liability to the jury, and litigate before the jury the issue of damages whenever the district court allowed such evidence to be presented. It might also have been allowable for the defaulters to stipulate, at least with the district court's approval, that they would default as to liability but preserve a right to offer evidence to the jury on damages whenever that issue was ripe. But having chosen simply to default when the case was called for trial, we think that the defaulters were subject to the ordinary rule that their right to jury trial was gone--a rule that reflects the practical need for flexibility where a litigant declines to appear for trial.

We are far more troubled by the district court's refusal to give the defaulting defendants a more substantial opportunity

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[4] In a multi-defendant case, courts do sometimes bring in the defaulting defendant at the damage phase, avoiding the risk of inconsistent damage verdicts against defendants who are jointly and severally liable. 10 Moore's Federal Practice, *supra*, § 55.25, at 55-45 to 55-47 (3d ed. 1998). Here, however, such a course--even if it had been considered--would have been complicated because no separate damage trial involving the presentation of evidence was held, despite the original bifurcation order.

to present evidence at the damages phase. As the case was originally structured, the district court's "bifurcation" order said that there would be three phases: one on liability, a second to determine the measure of damages if liability were established, and a third (probably involving a special master) to apply the general ruling on damages to specific plaintiffs or groups of plaintiffs. There was never any formal modification of this procedure so far as we are aware.

Nevertheless, during the Volvo liability phase, much of the plaintiffs' evidence was treated as bearing on both liability and damages, despite sporadic objection by Volvo to this course; in all events, Volvo ultimately treated the liability phase evidence as a sufficient basis for litigating damages and did not offer further evidence of its own in this second phase. How much the defaulting defendants knew of this gradual evolution is unclear but there is no indication that they ever waived their right to contest damages.

We are very reluctant to interfere with the discretion of the trial judge in the scheduling of hearings on damages, or anything else, for reasons too obvious to need recounting. *See Mendez v. Banco Popular de P.R.*, 900 F.2d 4, 7 (1st Cir. 1990). Yet, in this instance the refusal to allow some additional time beyond nine days to prepare for the hearing does seem to us to represent an abuse of discretion. And any doubt is resolved by our view that the curtailing of evidence was highly prejudicial and may well have resulted in a gross miscarriage of justice. For this reason we are constrained to order further proceedings on damages.

At the outset, we reject plaintiffs' suggestion that the defaulting defendants were debarred from contesting damages merely because they had defaulted on liability. The stipulated default notice made clear that the defaulters were conceding only the truth of the Third Amended Complaint, and the complaint set forth no specific amount of damages. Nor is it evident why the defaulters should be bound by a jury determination of damages against Volvo made in a proceeding

in which their participation was not invited and in which the jury fixed damages only against Volvo.

Plaintiffs argue on appeal that the defaulting defendants monitored the trial sufficiently to obtain notice as to when the jury would be considering the issue of damages--the implication being that if the defaulters wished to contest damages, it was their duty to advise the court at that time and offer what evidence they had to the jury. This argument is not entirely fanciful. Plaintiffs asserted at the August 29 hearing that counsel for the defaulting defendants had been present in the courtroom during the Volvo trial from time to time. Plaintiffs also argue, somewhat tenuously, that the defaulters' motion to alter or amend the partial default judgment against them reflected an awareness of the trial's progress.

We do not find these arguments persuasive under the present circumstances. Apart from uncertainty as to the factual predicate (i.e., what counsel for the defaulters knew about how the trial unfolded), it does not appear realistic to describe the damages phase of the Volvo trial as an independent, clearly demarcated proceeding to establish damages for all defendants, at which the defaulters' attendance was implicitly expected. On the contrary, the proceeding seems to have been an addendum to the Volvo trial and, we note, produced a jury verdict against Volvo only.

The district court seemingly thought that the concession of conspiracy by the defaulters (such an allegation was made in the complaint and therefore conceded) automatically made the defaulting defendants liable for any harm done by Volvo. So, arguably, it did--as to conduct within the scope of the conspiracy. But this does not mean that the defaulters were bound by a determination against Volvo as to the amount of damages made by the jury in a proceeding in which the defaulters played no part. We therefore conclude that the defaulters were entitled to offer evidence on damages.[5]

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[5] It is a different issue whether the district court could rely, in calculating such damages, on the evidence earlier offered in the

This brings us to the request for a continuance of the damages hearing. To expect the defaulting defendants to be able to produce their damage witnesses on nine days' notice--with no prior indication that such a hearing would be scheduled--is hard to understand. Defense counsel's explanation as to his absence from the country and the request for a one-month continuance was not the kind of empty excuse that is customarily brushed aside; and the period of delay requested was not long--representing 30 additional days in a case already pending for four years. Above all, at the hearing the defaulting defendants did not rest on generalities but explained rather specifically (and as it turns out cogently) what they wanted to try to prove at a hearing.

The district court said that the defendants should have been prepared to go on trial in August on the damage issue since they were prepared for a full trial on the merits in June. With respect, this seems to us a non sequitur. The defaulting defendants had ample notice as to the trial date on liability and chose to default; possibly even with notice they were not ready for trial. It would hardly be expected that counsel would reserve all subsequent dates and have witnesses virtually standing by for a damage hearing with no notice whatsoever as to when it was going to be scheduled. Under these circumstances, we conclude that the denial was error, if prejudicial.

Prejudice there surely was. The damage award against Volvo and the defaulting defendants is almost certainly an overstatement. It is based on the premise that every purchaser of a 240 Volvo in Puerto Rico between 1984 and 1993 was defrauded by the defendants in an average amount of approximately $7,000 per car, less an adjustment made by the jury for Puerto Rico excise taxes. Even if we assume that

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Volvo trial from which the defaulters voluntarily absented themselves and whether the defaulters could later insist on cross-examining such witnesses. We return to this issue in due course.

every single car purchaser was defrauded, the crux of the problem lies in the calculation of damages.

Damages in fraud cases are ordinarily measured either on an out-of-pocket basis or on an expectation theory. *See* Dobbs, Law of Remedies § 9.2(1), at 695-96 (1993). In this case, the plaintiffs ultimately followed the former approach, urging in effect that they were fraudulently induced to purchase an item by misrepresentations and non-disclosures, that the cars were worth less than they had paid, and that plaintiffs were therefore entitled to the difference between the purchase price and the lesser "actual value" of what they purchased. The purchase prices are known figures; the problem lies in computing the actual value of the purchased vehicles.

As noted, various plaintiffs testified that they would have paid less for the Volvos they purchased if they had been given accurate label information or had known that the emblem and accessories were added in Puerto Rico. The plaintiffs did not, however, try to quantify how much less they would have paid, and the figure presumably would have varied from purchaser to purchaser. To establish the "actual value" of what was purchased, the plaintiffs called experts who testified as to the selling price of unequipped Volvo DLs in the continental United States. Plaintiffs then argued to the jury that the actual value of what the plaintiffs purchased in Puerto Rico was the continental U.S. price for an unequipped DL increased by whatever the cost might be of individually purchased equivalent accessories.[6]

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[6] Plaintiffs' main expert offered charts, classifying purchases by year and various other categories (e.g., GLE 4 door sedan), purporting to compare the average Trebol price in Puerto Rico with the price of a DL on the mainland U.S. (How and where the latter was adjusted for accessories is unclear but not complained of.) The expert failed to account for Puerto Rico excise taxes, but the jury made a reduction, apparently on that account, reducing the average award from about $7,000 to about $5,000 per vehicle.

The obvious problem with this calculation is the assumption that there is one "actual value" of a Volvo, equipped or otherwise, that is common to both the continental United States and to Puerto Rico. Put differently, the plaintiffs' theory assumes that, had full disclosure been made, Volvos would have been for sale in Puerto Rico for the same prices offered in the continental United States. What the defaulting defendants offered to show, when they sought a hearing on damages, was that the two markets were not the same and that the price of a luxury car in Puerto Rico was customarily higher than the price in the continental United States.

Puerto Rico is a physically separated area where the direct competition for Volvo sales was likely to come not from other Volvo dealers (there were no other fully established Volvo dealerships in Puerto Rico so far as the record reveals), but from dealers specializing in other expensive cars; and one might reasonably expect there to be fewer such dealers than in New York or Florida. Costs are often higher in smaller markets, and even when they are not, competition is frequently less effective as a constraint where there are fewer immediate competitors.

One might argue that merely to show prices of Volvos in New York or Florida is itself no evidence of the actual value of an equivalently equipped car in San Juan; but we are inclined to think otherwise. Plaintiffs might say that the pricing in a nearby market was at least some evidence of actual value in Puerto Rico and that it was the defendants' responsibility to counter this argument with evidence to defeat the inference. But this, of course, is exactly what the defaulting defendants sought to do and were prevented from doing because of the district court's refusal to provide additional time.

The defendants did not merely offer to provide such evidence but pointed to a specific way of proving that prices for luxury cars were higher in Puerto Rico than they were in New York or Florida and by a very substantial margin. They

offered to produce evidence as to the pricing differential of other widely distributed luxury cars, mentioning specifically BMW, to show that the Puerto Rico prices were very much higher than the continental U.S. prices. One could also imagine securing more broad-ranging evidence from an economist or marketing expert as to why such differentials might be expected. Whether such evidence would entirely undermine plaintiffs' damage showing or merely allow for appropriate adjustment is something on which we need not speculate.

It is no pleasure to remand a proceeding, already long extended, because of the failure to give a thirty day extension. But in this case it is relatively easy to restore the status quo ante. No jury trial is required: the district judge simply needs to do now what he would have done if he had granted the requested extension, namely, to consider whatever evidence is tendered and reach a conclusion as to damages owed by the defaulting defendants (or at least the Gonzalezes, depending on how the bankruptcy issue is resolved). This may not be easy, but it is no harder now than it would have been earlier.

On remand, damages can certainly be based on the premise that plaintiffs, or at least some of them, would have paid less for their cars in Puerto Rico had they been given the additional information required by the Monroney Act and/or given accurate Law 77 figures instead of the inflated ones to which some of the plaintiffs were exposed. The more difficult question is whether the plaintiffs should be allowed to base their damage calculations on the notion that there was also an implicit misrepresentation or a culpable non-disclosure as to the affixing of emblems and the installation of accessories in Puerto Rico. Whether this will matter is unclear, but we think it useful to address the point.

Our conclusion is that the emblem and part accessories fraud claim is not a legitimate basis for computing damages. Insofar as it involves merely a failure to disclose that emblems and certain accessories were installed in Puerto Rico, this conclusion is easy. We have already determined that failure to

disclose this information does not constitute a valid claim under the present circumstances, see Volvo, slip op., pp. 13-19, and the defaulting defendants fully preserved this legal objection despite their default.

The greater difficulty is posed by the charge, explicit in the complaint, that there is such a thing as a real GL or GLE--differing in some unidentified way from DLs apart from emblem and accessories and their place of installation--and that the DLs sold in Puerto Rico were essentially disguised versions. There is nothing obviously wrong with this theory of liability; the difficulty is that it rests on a premise that we now know to be false or at least beyond plaintiffs' ability to prove. Should plaintiffs nevertheless be allowed to proceed to collect damages on this false premise, given that the defendants conceded the facts asserted in the Third Amended Complaint by defaulting at the liability phase of the trial?

We could find no precedent on this peculiar problem, and there may be no single answer independent of circumstances. In the present circumstances, we conclude that the emblem and accessories fraud theory should not be utilized in calculating damages. To the extent that it is independently viable apart from a mere failure to disclose where items were installed, the plaintiffs failed to prove it at trial against Volvo. There is no indication that more could have been proved against the defaulting defendants on this issue, and experts should not be asked to develop factual assertions about damages on a factual premise that was already shown to be untrue.[7]

At the same time, we think that in fairness the plaintiffs should be allowed to offer new case-in-chief evidence on damages on their Monroney Act and Law 77 label theory and

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[7] If there were any reason to think that plaintiffs would have had a stronger case on this issue against the defaulters than against Volvo, we would certainly allow the theory to stand. But the issue is the same regardless of the defendant, and plaintiffs had every incentive to marshal all their evidence against Volvo.

should not be limited to the expert testimony and other evidence offered against Volvo and to cross-examination or refuting defendants' witnesses. And to the extent that the district court sitting as factfinder wishes to rely on evidence submitted in the Volvo trial, it may do so as long as the defendants are given an opportunity to recall witnesses or offer evidence on a damage-related issue on which the Volvo-trial evidence reasonably bears. This, after all, is a bench trial.

Trebol's Bankruptcy. The Trebol defendants (not the Gonzalezes) filed for bankruptcy on September 30, 1996, and argued to the district court that the judgment dated October 10, 1996, was subject to the automatic stay of 11 U.S.C. § 362(a)(1). The district court held that, since the entry of judgment after the Trebol defendants' bankruptcy filing was purely "ministerial," the bankruptcy stay did not apply. Trebol appeals this ruling.

We recently set forth the characteristics that place action by a non-bankruptcy court within the automatic stay's narrow exception for "ministerial" actions. Generally, such actions are "essentially clerical in nature," such as the court clerk's docketing of a previously issued judicial disposition or similar act that does not require the exercise of an officer's discretion. *See In re Soares*, 107 F.3d 969, 974 (1st Cir. 1997). We expressly noted that ministerial acts "can usefully be visualized as the antithesis of judicial acts." Id.

Here, the district court had not publicly announced its judgment or submitted its decision to the court clerk by the time the bankruptcy petition was filed on September 30, 1996. The district judge may well have made up his own mind as to how he would rule, but to be workable, an exception to the automatic bar for ministerial acts has to be based on objective considerations. Otherwise, the reviewing court would be inquiring into the unexpressed state of mind of the trial judge, a course that would be unwise as well as impractical. We are not bound by the district court's own determination that entry of judgment after September 30 was ministerial. *See Soares*, 107 F.3d at 975.

Plaintiffs argue that objective evidence is provided by the district judge's statement at the August 29 hearing that the jury verdict against Volvo and the doctrine of consistency of judgments "affects" the judgment against the defaulting defendants. The statement mentioned came at the beginning of the hearing, before the defaulting defendants had been invited to present evidence or argue the issue of damages. We cannot treat this preliminary statement as a definitive decision on damages against Trebol, making everything that follows merely a ministerial act.

Consequently, the judgment as to Trebol was entered in violation of the stay. Although the automatic stay applies to appeals courts as well as district courts, we have by implication power to vacate a judgment entered in violation of the automatic stay. We therefore vacate the October 10 judgment against Trebol and direct that further proceedings against Trebol be halted until the stay is lifted.

Alternate Theory of Damages. The plaintiffs have filed a conditional appeal (No. 97-1145) addressing two issues, the first of which is directly relevant to the remand on damages. At trial, the district court instructed the jury that damages were to be calculated as the difference between the price paid by plaintiffs and the actual value of the cars received. The plaintiffs had requested a second theory that would have awarded the total amounts of money paid by plaintiffs as a result of the fraudulent transactions. The district court provisionally allowed this "full price" theory of damages in its order on bifurcation, but later rejected it during the trial against Volvo.

We think the district court was correct in denying recovery on the plaintiffs' alternate full price theory. The parties occasionally refer to the full price theory as a "rescission"-type remedy, seeking to place the plaintiffs in the same position that they would have been in absent the fraudulent transaction. Such a theory may be an appropriate alternative where a fraudulent sale can be effectively undone.

Cf. Randall v. Loftsgaarden, 478 U.S. 647, 661 (1986); *Winant v. Bostic*, 5 F.3d 767, 776 (4th Cir. 1993).

The theory is inappropriate here. Plaintiffs acquired their Volvo cars and have not offered to return them. Some still own their vehicles, and some have sold them for cash. Allowing plaintiffs to recover the full purchase price without requiring return of the vehicles would be an unjustifiable windfall. And putting aside the benefit plaintiffs obtained by using the cars over varying portions of the last decade, it would hardly be possible to return them now unblemished.

The cases cited by plaintiffs are not to the contrary. In *Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1569 (1st Cir. 1994), the defrauded insurer was allowed to nullify all insurance coverage because of fraud--disallowing even valid claims --but there is no indication that the insurer did not also return the insurance premiums it had received. Similarly, in *FTC v. Figgie International, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994), the order for a full refund "created no windfall" because plaintiffs who decided to keep the property they acquired due to the seller's fraud would forego the refund. We therefore need not decide the additional question mentioned in passing in *DeMauro v. DeMauro*, 115 F.3d 94, 98 (1st Cir. 1997): whether an equitable remedy like rescission is at all cognizable under RICO.

Prejudgment Interest. The plaintiffs' second issue on cross-appeal concerns prejudgment interest. The district court did not submit the issue of prejudgment interest to the jury, but initially granted prejudgment interest on its own motion. It later reversed this decision, and plaintiffs now urge that, in the event that we remand this case for a new trial, the issue of prejudgment interest should be submitted to the jury. Notably, plaintiffs do not argue that the district court abused its discretion in refusing to award prejudgment interest.

There will be no new trial against Volvo, for the reasons stated in our Volvo opinion. As to Trebol and the Gonzalez defendants, the case is being remanded only to determine the

amount of damages. As we note above, because of the default the district court is not required to hold a jury trial on damages. We view it as unlikely that the district court will decide to impanel a second jury solely for the issue of damages.

We therefore leave for another day questions regarding the general availability of prejudgment interest in RICO cases, whether it should be left to a jury acting as factfinder, and whether prejudgment interest would be appropriate in this case. On remand, the district court is free to reconsider whether to grant prejudgment interest, a decision we will review if and when necessary, but there is no present reason for us to anticipate that the district judge will alter his position.

The district court's judgment entered on October 10, 1996, is vacated as to Trebol and the Gonzales defendants, and the matter is remanded for proceedings consistent with this opinion.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1135

LUIS BONILLA, ET AL.,
Plaintiffs-Appellees,
v.
VOLVO CAR CORPORATION,
Defendant-Appellant.

No. 97-1140

Luis BONILLA, ET AL.,
Plaintiffs-Appellees,
v.
TREBOL MOTORS CORPORATION, ET AL.,
Defendants-Appellees.

Richardo Gonzalez-Navarro and Conchita Navarro De Gonzalez,
Defendants-Appellants.

No. 97-1143

Luis BONILLA, ET AL.,
Plaintiffs-Appellees,
v.
TREBOL MOTORS CORPORATION, ET AL.,
Defendants-Appellants.

No. 97-1145

LUIS BONILLA, ET AL.,
Plaintiffs-Appellants,
v.
TREBOL MOTORS CORPORATION, ET AL.,
Defendants-Appellees.

Before
Torruella, Chief Judge,*
Selya, Boudin, Stahl, Lynch and Lipez, Circuit Judges

ORDER OF COURT
Entered: October 7, 1998

The panel of judges that rendered the decision in these cases having voted to deny the petitions for rehearing and the suggestions for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petitions for rehearing and the suggestions for rehearing en banc be denied.

By the Court:

Phoebe D. Morse, Clerk

By: /s/
Chief Deputy Clerk

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* Judge Campbell did not participate in the decision of these cases.